The Ideology of Human Rights

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INTRODUCTION

Over the last fifty years the international law of human rights has steadily achieved a moral plateau rarely associated with the law of nations.[1] A diverse and eclectic assortment of individuals and enti-

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1. In the wake of World War II, member states of the United Nations adopted on December 10, 1948, the Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]. Although the UDHR was adopted without opposition by a vote of 48 to zero, it was the subject of eight abstentions: Byelorussia, Czechoslovakia, Poland, Soviet Union, Ukraine, Yugoslavia, Saudi Arabia, and South Africa. See Antonio Cassese, The General Assembly: Historical Perspective 1945-1989, in The United Nations and Human Rights: A Critical Appraisal 25, 31 n.22 (Philip Alston ed., 1992) [hereinafter United Nations and Human Rights]. It is significant to note that many of the triumphant Western powers who formulated the UDHR held colonies and other dependent territories at the time. Moreover, these possessions, which were largely located in Africa and Asia, did not participate in the Declaration's creation. The UDHR, though only a declaration without binding authority on member states, was the lowest threshold, the most basic common denominator, on which the states then represented at the United Nations could agree as representative of a general understanding of the relationship between the individual and the state and the freedoms and rights of individuals in organized political society. See id. at 31. Now widely viewed as the "gospel" of the human rights movement, the UDHR has been the predominant road map in the development and elaboration of a "universal" jurisprudence of human rights.

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ties now invoke human rights norms and the attendant phraseology with the intent of cloaking themselves and their causes in the paradigm's perceived power and righteousness.[2] What is interesting is the failure of this universal reliance on the language of human rights to create agreement on the scope, content, and philosophical bases of the human rights corpus. Intellectual and policy battles have focused on its cultural relevance, ideological and political orientation, and thematic incompleteness.[3] Notwithstanding these

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The parental basis and condensed "philosophy" of the U.N. human rights corpus, the UDHR is now regarded by some leading authorities as a normative instrument, a part of customary international law in spite of its peculiarly "Western" orientation and content. See Thomas Buergenthal & Harold G. Maier, Public International Law In a Nutshell 119-20 (1990). More general and less controversial, however, is the view that some UDHR rights, particularly those that implicate state action against personal security, such as freedom from torture, slavery, illegal detention, and disappearances, have achieved the status of customary international law. See Thomas Buergenthal, International Human Rights In a Nutshell 32 (1988) [hereinafter Buergenthal Nutshell]; see also Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding deliberate torture perpetrated under color of official authority violates universally accepted norms of human rights); Restatement (Third) of Foreign Relations § 702 (1986) (enumerating seven types of conduct considered to be violations of the customary international law of human rights).

2. See, e.g., Statement to the World Conference on Human Rights on Behalf of the Committee On Economic, Social and Cultural Rights, U.N. ESCOR, 7th Sess., Supp. No. 2, Annex III, at 82, U.N. Doc. E/1993/22 (1993) (making the point that economic, social, and cultural rights should not be treated as inferior to civil and political rights); Stephen Cohen, Conditioning U.S. Security Assistance On Human Rights Practices, 76 Am. J. Int'l L. 246 (1982) (arguing that international human rights law imposes corresponding obligations on one government not to support another that violates human rights); Karl E. Klare, Legal Theory and Democratic Reconstruction, 25 U. Brit. Colum. L. Rev. 69, 95 (1991) (concluding, despite his critique of rights, that the post-communist regimes of Eastern Europe should be founded on human rights guarantees); Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 Am. J. Int'l L. 866, 869-71 (1990) (arguing that a new human rights-based conception of "popular sovereignty" permits the world community to intervene militarily in a country to remove coup-makers who abrogate that sovereignty, particularly if the popular will has been expressed through internationally supervised free and fair elections). For additional causes that claim the mantle of human rights, see Farooq Hassan, The Right to be Different: An Exploratory Proposal for the Creation of a New Human Right, 5 Loy. L.A. Int'l & Comp. L.J. 67 (1982); Eric Heinze, Sexual Orientation: A Human Right (1995); Ours By Right: Women's Rights as Human Rights (Joanna Kerr ed., 1993); Henry J. Richardson, The Right to Food: The International Human Rights Response, 30 How. L.J. 233 (1987); Eugene W. Rostow, Peace as a Human Right, 4 N.Y.L. Sch. J. Int'l & Comp. L. 215, 217 (1983); Melissa Thorme, Establishing Environment as a Human Right, 19 Denv. J. Int'l L. & Pol'y 301 (1991).

3. For discussions of different and conflicting cultural, historical, and intellectual bases and traditions in human rights, see Josiah A.M. Cobbah, African Values and the Human Rights Debate: An African Perspective, 9 Hum. Rts. Q. 309 (1987); Jack Donnelly, Cultural Relativism and Universal Human Rights, 6 Hum. Rts. Q. 400 (1984); Bilahari Kausikan, Asia's Different Standard, 92 Foreign Pol'y 24 (1993) (advancing the view that Asia has its own distinctive historical and cultural values which may differ or should not be easily analogized with the "universal" human rights norms promoted by the West); Makau

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questions, the seduction of human rights discourse has been so great that it has, in fact, delayed the development of a critique of rights.[4]

This Article focuses upon what these polar impulses and positions—the fight over the content of human rights, on the one hand, and their captivating allure, on the other—have obscured: that although it seems implausible to openly deny that the human rights corpus is the construction of a political ideology, the discourse's major authors present it as non-ideological. They use a vocabulary that paints the movement as both impartial and the quintessence of human goodness. They portray it as divorced from base materialism, self-interest, and "ideology." Perhaps they do so because "ideology" has a negative connotation: it is the instrument that the "other," the adversary, the opponent, uses to challenge and seek the marginalization of the forces of "good." In reality, however, the human rights corpus is not a creed or a set of normative principles suspended in outer space; the matters that it affects are earthly and concern immediate routine politics.[5] The larger political agenda of the human rights regime has, however, been blurred by its veneration and by attempts to clean it of the taint of partisanship.

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wa Mutua, The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, 35 Va. J. Int'l L. 339 (1995) [hereinafter Mutua, African Cultural Fingerprint]; Raimundo Pannikar, Is the Notion of Human Rights A Western Concept?, 120 Diogenes 75 (1982). For discussions on the hierarchy and "importance" of some rights over others, see Philip Alston & Gerard Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights, 9 Hum. Rts. Q. 156 (1987) (arguing against a prejudiced hierarchy of rights which subordinates economic, social, and cultural rights to civil and political rights); Theodor Meron, On a Hierarchy of International Human Rights, 80 Am. J. Int'l L. 1 (1986). For discussions on the inclusion or exclusion and enforcement of women's rights as human rights, see Sandra Coliver, United Nations Machineries on Women's Rights: How Might They Better Help Women Whose Rights Are Being Violated?, in New Directions in Human Rights 25 (Ellen L. Lutz et al. eds., 1989); Margaret E. Galey, International Enforcement of Women's Rights, 6 Hum. Rts. Q. 463 (1984).

4. Cf. Karen Engle, International Human Rights and Feminism: When Discourses Meet, 13 Mich. J. Int'l L. 517, 518-19 (1992) (exploring the different "affirmative" human rights approaches taken by advocates of international women's rights even as they have critiqued extant rights frameworks to better the lives of women); Klare, supra note 2, at 95 (arguing that the "critique of rights" debate raises issues that should play a role in the democratic legal reconstruction of Eastern Europe).

5. Cf. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . .").

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This Article examines the theoretical and practical work of the major authors[6] of human rights discourse and develops the proposition that human rights and Western liberal democracy are virtually tautological. Although the two concepts seem different from a distance, one is in fact the universalized version of the other; human rights represent the attempted diffusion and further development at the international level of the liberal political tradition. These processes have contributed to the reexamination and reconstruction of liberalism, and have in some respects refined and added to the liberal tradition. It seems to be true historically that for political movements and ideologies, from nationalism to free enterprise and beyond, totems or myths are necessary to remove them from their earthly moorings.[7] For liberal democracy that totem appears today to be the human rights corpus, the moralized expression of a political ideology. Although the concept of human rights is not unique to European societies, I argue here that the specific philosophy on which the current "universal" and "official"[8]

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6. I use the term "authors" more broadly here to describe all those individuals and entities that have exerted discernible influence in the normative development and practical enforcement of human rights law. These include the United Nations and its factions, leading non-governmental human rights organizations, based almost exclusively in Western Europe and North America, and academic and other conceptual writers. In the past several decades, thousands of organizations, activists, and scholars in Africa, Asia, Latin America, and everywhere in between, have adopted and adapted the message of the authors and added to its "globality" and "universality." Regional human rights systems in Africa, the Americas, and Europe have also contributed to the "worldization" of human rights. These are anchored by the following instruments: (i) the African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982) [hereinafter African Charter]; (ii) the American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 Rev.2, reprinted in 9 I.L.M. 673 (1970); (iii) the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (1955); and (iv) the European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (1965).

7. Myths of racial superiority and other "justifications" for the repression of one group by another have often served as a pretext for the control of political power and resources. The White American "rationale" for the enslavement of Africans or the White South African construction of the concept and practice of apartheid—both steeped in religion and pseudo-science—enhanced White nationalism and the control by Whites of state power. Similarly, philosophical justifications for free enterprise rest on nebulous conceptions of the "nature" of individual human beings, their relationships, and their motivations to acquire property.

8. I use the term "official" to describe the "mainstream" and popular conceptions of the human rights movement, that is, as norms and codes of conduct developed and promoted by Westerners after the 1939-45 war for the purposes of limiting the abuse of individuals by their governments. This version of human rights has been largely authenticated and mediated through the United Nations. See, e.g., UDHR, supra note 1; the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR,

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human rights corpus is based is essentially European.[9] This exclusivity and cultural specificity necessarily deny the concept universality. The fact that human rights are violated in liberal democracies is of little consequence to my argument and does not distinguish the human rights corpus from the ideology of Western liberalism; rather, it emphasizes the contradictions and imperfections of liberalism. In other words, the elusive state of perfection in which human rights are *fully* respected and realized tells us, among other things, that both human rights and democracy are works in progress. They are projects that are essentially infinite, open-ended, and highly experimental in nature.

Since World War II, the United Nations, non-governmental organizations, and scholarly writers have created a thicket of norms, processes, and institutions that purport to promote and protect human rights. Working with the so-called International Bill of Rights as their basis,[10] the key but diverse collection of organizations and scholars has tended to agree on an irreducible human rights core.[11] This core, although stated in human rights terms, is now being formulated into the emergent norm of democratic gov-

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21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) [hereinafter ICESCR]; the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976) [hereinafter ICCPR]; the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter Optional Protocol].

9. See Jack Donnelly, Human Rights and Western Liberalism, in Human Rights in Africa: Cross-Cultural Perspectives 31 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990) [hereinafter Cross-Cultural Perspectives]; Virginia Leary, The Effect of Western Perspectives on International Human Rights, in Cross-Cultural Perspectives, supra, at 15. A system of human rights is comprised of the norms, processes, and institutions that protect human dignity, an ideal that is prevalent in all cultures of the world. Different cultures, however, have evolved different systems for protecting human dignity. As has been argued elsewhere, the duty/rights dialectic was essential in the protection of human rights in pre-colonial Africa. See generally Mutua, African Cultural Fingerprint, supra note 3. Societies evolve particular systems of human rights protection based on their histories and philosophical and religious traditions. Within their own cultural spaces, various traditions evolve norms and processes that safeguard individuals, communities, and political societies. See id.

10. The International Bill of Rights consists of: (i) the UDHR, supra note 1; (ii) the ICCPR, supra note 8; (iii) the ICESCR, supra note 8; and (iv) the Optional Protocol, supra note 8.

11. This core includes personal security rights, rights that implicate state power. In conventional jargon, they are negative, "hands off" rights that individuals enjoy in relation to the state.

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ernance in international law.[12] The routes different authors of human rights have taken to arrive at these conclusions are, of course, varied. Nevertheless, I have identified the four defining approaches or schools of thought into which I believe all the paramount voices writing and acting in the human rights discourse fall.[13] I believe that these voices express the synonymity and close fit of the human rights corpus with its parent, Western liberalism.

The proponents of and adherents to the four dominant schools of thought may be classified as (i) conventional doctrinalists, (ii) constitutionalists or conceptualizers, (iii) cultural agnostics or multiculturalists, and (iv) political strategists or instrumentalists. Although most of these voices differ—in some instances radically—on the content of the human rights corpus and whether or how the contents should be ranked, they are nevertheless united by the belief that *there are* basic human rights. They also believe that these human rights should be promoted and where possible protected by the state, the basic obligor[14] of human rights law. These

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12. For discussion of the norm of democratic governance in international law, see Gregory H. Fox, The Right to Political Participation in International Law, 17 Yale J. Int'l L. 539 (1992); Thomas M. Franck, The Emerging Right to Democratic Governance, 86 Am. J. Int'l L. 46 (1992) [hereinafter Franck, The Emerging Right]. The democratic project, which can be stated in explicitly human rights terms, builds on the conception that "core" rights can only be realized and protected in a political society organized through the liberal democratic framework.

13. There are, of course, other major voices, such as Martti Koskenniemi, whose work has focused on the deconstruction of human rights discourse and the unveiling of the interests, struggles, and politics that are hidden behind the rhetoric of international law and human rights. But when I speak of the paramount voices in the movement, I do not mean Koskenniemi or those with similar approaches; I speak primarily of the originators, the conceptualizers of the movement, those who are responsible for its construction. See, e.g., Martti Koskenniemi, The Politics of International Law, 1 Eur. J. Int'l L. 4 (1990).

14. Human rights law, like all other law, is a statist or structural construct in that it is the formulation of the package of obligatory relationships—rights as well as duties—from the state to the individual and vice versa. The dominant tradition of the human rights movement derives from that brand of Western liberalism which atomizes and alienates the singular individual from both the state and the society. See Donnelly, Human Rights and Western Liberalism, supra note 9, at 31. John Locke is the most prominent early Western thinker to condense this compact into a philosophy. See John Locke, Two Treatises of Government (Peter Laslett ed., 1988). In effect, human rights law is only possible because of the existence of the state, whose basic duty, at least in the dominant Western tradition, has been to protect the individual and property. More progressive interpretations of human rights have now forced the implication of state action even under circumstances where causation is not directly attributable to the state, as in cases of domestic violence against women or other discriminatory practices by private entities. See, e.g., Karen Engle, After the Collapse of the Public/Private Distinction: Strategizing Women's Rights, in Reconceiving Reality: Women and International Law 143 (Dorinda G. Dallmeyer ed., 1993) (critiquing the understanding of the public/private distinction in international law); Elizabeth Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973, 974 (1991) (discussing

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different schools disagree, however, on the political orientation of human rights, the weight accorded to certain rights, and strategies and tactics for the enforcement of the human rights movement's norms. These disagreements reflect the different visions and trajectories of liberalism, the types of societies intended by advocates of human rights, and the purposes to which they feel the human rights discourse should be directed.

This Article argues that the human rights corpus, taken as a whole, as a document of ideals and values, particularly the positive law of human rights, requires the reconstruction of states to reflect the structures and values of governance that derive from Western liberalism, especially the contemporary variations of liberal democracy practiced in Western democracies. While these democracies differ in the content of the rights they guarantee and the organizational structures they take, they are nevertheless based on the idea of constitutionalism.

Viewed from this perspective, the human rights regime has serious and dramatic implications for questions of cultural diversity, the sovereignty of states, and ultimately the "universality" of human rights. The purpose here, however, is not to mediate these conflicts, but rather to expose them and to allow diverse stakeholders to reflect on their meaning and the policy issues they raise. The four schools of thought serve as a starting point to explore the divergent pathways that each school's proponents take to converge on the concept of human rights in international law.

The first two approaches, which are espoused by conventional doctrinalists and conceptualizers or constitutionalists, are closest in ideological orientation and share an unequivocal belief in the redemptive[15] quality and power of human rights law. Admittedly, there is a wide and contrasting diversity of attitudes towards the human rights corpus within the two schools. While the doctrinalists tend to be statisticians of violence, conceptualizers are at their core systematizers of the human rights corpus. For the latter, human rights norms arise out of the liberal tradition, and their application should achieve a type of a constitutional system broadly referred to as constitutionalism. Such a system generally has the following characteristics, although the weight accorded to

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the effect of the public/private dichotomy on societal understandings about the rights of abused or battered women).

15. By "redemptive quality" I mean their faith in the power of the human rights regime, if fully enforced, to substantially eliminate violations of the individual. According to them, the enforcement of human rights norms stands between tyranny and freedom.

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each differs from one state to the next: (i) political society is based on the concept of popular sovereignty; (ii) the government of the state is constitutionally required to be accountable to the populace through various processes such as periodic, genuine, multi-party elections; (iii) government is limited in its powers through checks and balances and the separation of powers, a central tenet of the liberal tradition; (iv) the judiciary is independent and safeguards legality and the rule of law; and (v) the formal declaration of individual civil and political rights is an indispensable facet of the state.[16]

While conceptualizers are more critical of the corpus, many of the conventional doctrinalists see it in almost religious dimensions. Nevertheless, many of the voices in the two schools see themselves in a variety of guises: as inheritors of the Western historical tradition pitting individual rights against the state, as guardians of human rights law, or as founders, conceptualizers, and elaborators of the human rights corpus. The two schools constitute what I call the human rights "orchestra" in which their proponents are the composers and conductors of the discourse; they "control" the content and map the margins of the discourse. Conventional doctrinalists are marked by their heavy and virtually exclusive reliance on positive law in treaties, custom, and other sources of international law as the basis for their activist advocacy or scholarly inquiry. The vast majority of doctrinalists "who matter" operate in the context of human rights non-governmental organizations (NGOs) in the West, although a number of academics also write in this mold.[17] In contrast, constitutionalists are usually found in the realm of theory.

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16. See Henry J. Steiner & Philip Alston, International Human Rights in Context: Law, Politics, Morals 710-725 (1996) [hereinafter Steiner & Alston, International Human Rights in Context].

17. Conventional doctrinalists profess almost blind allegiance to "standards" and fashion their mandates or points of reference strictly on those standards. For example, the New York-based Lawyers Committee for Human Rights, one of the major American NGOs with an international mandate, proclaims in every human rights report that "its work is impartial, holding each government to the standards affirmed in the International Bill of Human Rights." This claim conceals more than it reveals and could even be interpreted as misleading in a number of respects. The Lawyers Committee does not address human rights issues in *all* countries or simply apply the International Bill of Human Rights in its work. Instead, it focuses on a very small number of countries in the lesser-developed nations of the South—usually those with historically strong ties to the United States—and only deploys a highly select list of rights from the ICCPR. See Lawyers Committee for Human Rights, Critique: Review of the Department of State Country Reports on Human Rights Practices for 1990, back leaf (1991); Lawyers

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Both schools enjoy a spirited supporting cast in the non-Western world. In the last several decades, the number of national human rights NGOs and human rights academics has mushroomed in the South. In virtually all cases, they reproduce intellectual patterns and strategies of advocacy similar to those in the West. Although there are some significant differences on the emphasis placed on certain rights, there has been little originality as the corpus has conquered new territory outside the West.

Substantively, doctrinalists stress the primacy of civil and political rights[18] over all other classes of rights. Thus, only a small number of "traditional" civil and political rights comprise the heart of the human rights regime. In addition, doctrinalists seek immediate and "blind" application of these rights without regard to historical, cultural, or developmental differences among states and societies. Many constitutionalists, on the other hand, recognize the supremacy of these "core" rights but point out that the list could or should be expanded. They see the difficulties of "immediate" implementation and prefer a more nuanced approach, staggered to take into account variables of culture, history, and other cleavages. Although many who adopt this approach are positivist, some are critical thinkers who subject the human rights regime to a probing critique. I call them constitutionalists because they believe that, as a whole, human rights law is or should be a constitutional regime and a philosophy that is constitutive of a liberal democratic society, along a spectrum that stretches from a bare republican state to the social democratic state. In the republican "minimum" state, the archetypal nineteenth century liberal state, the government protects the privileges of the few against the poor masses, as well as ethnic, racial, religious, and sexual minorities. In the twentieth century, however, the liberal tradition is developed and constructs

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Committee for Human Rights, Impunity: Prosecutions of Human Rights Violations in the Philippines, back leaf (1991). Some academics, such as Louis Henkin, the distinguished Columbia Law School professor, should be perceived as both doctrinalist and constitutionalist; although he is primarily an academic, he is also a strong advocate of positive human rights law. See, e.g., Louis Henkin, The Age of Rights x (1990) (challenging those who argue for broad, vague declarations of rights and extolling the virtues of the UDHR).

18. Although the term "negative" rights is for all intents and purposes meaningless when talking about categories of rights and the role of the state in their realization, it is the image that conventionally describes a very small collection of civil and political rights which are seen as the "core" of human rights. Such rights usually involve personal security and freedom from the state. See also supra note 11 and accompanying text.

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the social welfare state in which the government progressively and affirmatively seeks to give substance to formal equality.

Cultural agnostics are generally outsiders who see the universality or convergence of some human rights norms with certain non-Western norms and as a result partially embrace the human rights corpus. Many are scholars and policymakers of multicultural heritage or orientation who, though familiar and sometimes even comfortable with the West, see cross-cultural referencing as the most critical variable in the creation of a universal corpus of human rights.[19] They critique the existing human rights corpus as culturally exclusive in some respects and therefore view parts of it as illegitimate or, at the very least, irrelevant in non-Western societies. Some, including this author, have called for a multicultural approach to reform the human rights regime so as to make it more universal.[20] Many proponents of the first two schools who regard themselves as universalists have labelled many cultural agnostics "cultural relativists," a form of type-casting or human rights name-calling that has generally had the effect of stigmatizing those who resist the Eurocentric formulation of human rights.[21] Were this Article confined to this dichotomous view, it would be fair to label the universalists cultural relativists, as well, because universalists operate in a specific cultural space and distinct historical tradition. The perspective reflected here is not, however, sympathetic to cynical elites who purposely manipulate cultural images to justify despotic rule.[22] Rather, by cultural agnostics I refer to academics and

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19. For views of cultural agnostics, see Mutua, African Cultural Fingerprint, supra note 3 (arguing that the current human rights regime is Eurocentric and that the creation of a truly universal human rights jurisprudence can result only from the multicultural elaboration of norms); Kausikan, supra note 3, at 25 (contending that Asian countries rely on their own traditions, and not just Western pressure, to govern their citizens in a way which respects the human dignity of individuals); see also Human Rights: Cultural and Ideological Perspectives (Adamantia Pollis & Peter Schwab eds., 1979) (examining the relevance of a universal standard of human rights to societies with a non-Western cultural tradition); see generally Cross-Cultural Perspectives, supra note 9; Human Rights in Cross-Cultural Perspectives: A Quest for Consensus (Abdullahi Ahmed An-Na'im ed., 1992) [hereinafter Quest for Consensus].

20. See Mutua, African Cultural Fingerprint, supra note 3, at 345-46.

21. For bold universalist views and a rejection of the multiculturalist approach, see Jack Donnelly, Universal Human Rights in Theory and Practice (1989); Rhoda E. Howard, Group Versus Individual Identity in the African Debate on Human Rights, in Cross-Cultural Perspectives, supra note 9, at 159.

22. Some of the world's notorious dictators have on occasion misappropriated tradition to justify repression. For example, Hastings Kamuzu Banda, formerly the absolute leader of Malawi, instituted "traditional courts" through which his political opponents were dispatched after sham trials. See Makau wa Mutua, Confronting the Past: Accountability

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policymakers who see the potential dynamism of the human rights corpus as an opportunity for the creation of a multicultural conception of human rights.

The last school, that of political strategists or instrumentalists, abounds with governments and institutions that selectively and inconsistently deploy human rights discourse for strategic and political ends.[23] While all states—socialist or capitalist, developed or underdeveloped—are generally cynical in their deployment of human rights norms, my focus here is not on all states. If that were the case, I would discuss the hypocrisies of the Zairian state under Mobutu Sese Seko, those of the former Soviet Union, and of many

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for Human Rights Violations in Malawi (1994). Similarly, some oppressive Asian states have cynically invoked tradition and culture to ward off human rights challenges. Human Rights Watch (HRW), the dominant American human rights NGO with an international mandate, has repeatedly attacked Asian governments for promoting an "Asian concept of human rights." Human Rights Watch, Human Rights Watch World Report 1995: Events of 1994, at xiv (1995)[hereinafter World Report 1995]. HRW has argued that Asian governments falsely maintain that Asians "sought economic development before political liberty, valued communal obligations over individual rights, and supported national rather than universal human rights standards." Id. For a powerful critique of the positions espoused by Asian governments, see Yash Ghai, Human Rights and Governance: The Asia Debate, 15 Austl. Y.B. Int'l L. 1 (1994).

23. A good example of such a government is that of the United States which, using human rights as the pretext, nevertheless applies two distinct policies to two countries with similar political systems. The United States has developed its economic and diplomatic relationships with The People's Republic of China (PRC) but has steadfastly rejected the normalization of relations with Cuba even though both countries are ruled by one-party communist regimes. According to Western human rights groups, human rights abuses in both countries are plentiful. See World Report 1995, supra note 22, at 85-89, 142-49; Diane F. Orentlicher & Timothy A. Gelatt, Public Law, Private Actors: The Impact of Human Rights on Business Investors in China, 14 Nw. J. Int'l L. & Bus. 66 (1993) (discussing the role played by human rights in the decisions of private corporations to invest in China); Douglas Jehl, U.S. is to Maintain Trade Privileges for China's Goods, N.Y. Times, May 27, 1994, at A1 (describing the U.S. decision not to use trade as a lever to force an improvement of China's human rights practices); see also Roger Sullivan, Discarding the China Card, 86 Foreign Pol'y 3 (1992)(examining a revision in U.S. China policy). There seems little doubt that it is China's significant size, population, military capability (nuclear), and potential market which has drawn the United States close to it. See Mary McGrory, The Fog of Morality, Wash. Post, Feb. 10, 1991, at C1 (contrasting the cynical reactions of the Bush administration to the Iraqi abuses in Kuwait and the Chinese crackdown against its dissidents). Human rights concerns, which have historically been used by the United States as a weapon of foreign policy, were trumped by the need for a better relationship with China. On the other hand, Cuba's continued isolation appears to be more closely related to Cold War nostalgia and American domestic politics—political pandering to the Cuban-American lobby—than simply the human rights record of the Castro government. In any event, states that have committed egregious human rights violations such as Egypt, Israel in the Occupied Territories, Turkey, Vietnam, and Russia, have enjoyed U.S. support. Rhetorically, however, the United States continues to promote democracy and human rights abroad.

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other states across the political spectrum that professed allegiance to human rights but violated them as official policy. My concern here is not with claims of states about their internal application of human rights norms. Rather, I am only interested in Western democracies and their institutions which alone rhetorically champion the universalization of human rights. Such institutions include the World Bank and the North Atlantic Treaty Organization (NATO), whose primary purposes are related to the preservation or the enhancement of liberalism and free markets. Increasingly, they have invoked human rights when dangers to these two goals have been deemed unacceptably high. Examples of such unacceptable dangers include civil war or regional conflicts that threaten "vital" Western interests, such as access to strategic resources. In the view of international financial institutions, donor agencies, and donor countries, such a risk could involve autocratic forms of governance that encourage intolerable levels of corruption and economic mismanagement and negatively affect the growth or functioning of markets and international trade.[24] Responses to such risks, including military ones, have in the past often been couched in human rights terminology.[25]

Obviously, human rights issues cannot be, nor should they be, the only factors that determine foreign policy choices. Other "vital" interests such as trade could trump human rights because in the calculus of geopolitics states have "many fish to fry." Yet it is precisely this "necessity" to balance competing objectives that

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24. In general, popular demands for open political competition gained near universal recognition in the West after the collapse of the Soviet bloc in the late 1980s. Donor countries and agencies began to press one-party states in Africa to allow multi-partyism, liberalize their economies, and show more respect for human rights. In November 1991, for example, a World Bank-led group of donors interested in Kenya suspended aid to that country pending political and economic reforms. The donors stressed that "good governance is a prerequisite for equitable economic development" and urged Kenya to move towards "greater pluralism." They "underlined the importance of the rule of law and respect for human rights, notably the basic freedoms of expression and assembly, and called for firm action to deal with issues of corruption." Press Release of the World Bank 3 (Paris Nov. 26, 1991) [hereinafter Meeting of the Consultative Group for Kenya] (summing up the proceedings at the meeting of the Consultative Group for Kenya) (on file with the Virginia Journal of International Law). See also Lawyers Committee for Human Rights, The World Bank: Governance and Human Rights 43-60 (1993) [hereinafter Governance and Human Rights].

25. See, e.g., Diane Bartz, Amnesty International Scores Washington for Hypocrisy in Human Rights, UPI, July 9, 1991, available in LEXIS, News Library, ARCNWS File (reporting that Amnesty International accused the United States of "selectively using human rights abuses as a foreign policy tool").

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makes states unreliable, unprincipled, and manipulative proponents of the human rights corpus.

By grouping the authors of human rights discourse into these four schools, I do not mean to suggest that the typologies or categories delineated are finite, completely separate and irreconcilable, or that one could not understand the "creators" of the discourse differently. I also do not mean to imply that the proponents of various typologies are one-dimensional; one author could fall into several categories depending upon the circumstances. Any number of critiques—from the feminist to the post-modern—would yield interesting results. This Article, however, is concerned with correlating the recent and "lofty" mantra of human rights to liberalism, arguably the most dominant political ideology of our time.

Part I of this Article briefly discusses the basic notions and requirements of liberal democracy and relates them to the central tenets of the human rights corpus. Part II focuses on the first school, that of the abolitionists or doctrinal conventionalists. Part III explores the assumptions and views of constitutionalists, while Part IV examines the dilemmas of the cultural agnostic. Lastly, Part V looks at political strategists.

This Article analyzes each of the four schools of thought and action to determine how they may be traced back to liberal democracy. It attempts to respond to the challenges and questions raised for the human rights corpus by these typologies. In particular, it revisits questions of the universality and legitimacy of the human rights corpus, and raises the possibility of a new internationality in human rights including its potential implications for the post-liberal society.

I. LIBERALISM, DEMOCRACY, AND HUMAN RIGHTS: A HOLY TRINITY?

Liberalism is distinguished from other traditions by its commitment to formal autonomy and abstract equality. It is a tradition that in its contemporary expression requires a constitutional state with limited powers, a state that is moreover accountable to the broad public. These aspirations are the basis for the development and elaboration of liberal democracy and, as this Article contends, the construction and universalization of the jurisprudence of human rights. In the historical continuum, therefore, liberalism gave birth to democracy, which, in turn, now seeks to present itself internationally as the ideology of human rights. This Part briefly

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explores the relationships among liberalism, political democracy, and human rights norms.

While many definitions of Western liberal democracy abound, the most dominant cast it in other than substantive terms. Samuel Huntington, for example, emphasizes the Schumpeterian[26] tradition, defining democracy in purely procedural language.[27] For Huntington, the democratic method involves two basic dimensions: contestation and participation, where the "most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote."[28] Participation and contestation, according to Huntington, also imply certain civil and political freedoms which are necessary to free and fair elections, namely, the right to speak, publish, assemble, and organize.[29]

Significantly, Huntington does not believe that a system is democratic to the extent that it denies "voting participation" to segments of its population on the basis, for instance, of race or gender.[30] Thus the United States was not a democracy until it allowed its population of African ancestry the right to vote.[31] Likewise, South Africa was undemocratic until it granted its black African majority

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26. Joseph Schumpeter, Capitalism, Socialism, and Democracy (3d ed. 1950). Schumpeter rejected the means and ends paradigm—which he called the "classical theory of democracy"—in which the "common good" was achieved through recourse to the "will of the people." Id. at 250-52. Schumpeter posited that the "democratic method is the institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." Id. at 269.

27. Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century 6 (1991).

28. Id. at 7. Thus, a system is undemocratic where the following factors obtain: the opposition is not permitted to participate in elections, or is prohibited or curbed; opposition media, especially newspapers, are closed down or censored; or votes are tampered with or miscounted. Competition could be insufficient where an opposition experiences sustained failure over long periods to win elections. Id. at 7-8.

29. Id. at 7. These rights are central features of the human rights corpus. See, e.g., UDHR, supra note 1, arts. 19-21; ICCPR, supra note 8, arts. 19-22.

30. Huntington, supra note 27, at 7.

31. Although the Fifteenth Amendment to the U.S. Constitution prohibited the denial of the right to vote on the basis of race, many Southern states enacted laws designed to obstruct the exercise of that right by African-Americans. For example, some laws imposed the ability to read or write as a precondition for registration, a requirement that excluded many African-Americans. See Gerald Gunther, Individual Rights in Constitutional Law 625-31 (5th ed. 1992); see also Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-3 (1988) (prohibiting various methods of obstructing citizens from exercising their right to vote).

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the right to vote in 1994.[32] Many European countries, such as Switzerland, were undemocratic until they granted women the right to vote, likewise the United States until 1920.[33] The norm of nondiscrimination is here extended to political participation. The formal right to vote is clearly in itself an insufficient measure of democracy because quite often it has masked other hindrances to political participation such as institutional biases and barriers based on race, gender, religion, social status, and wealth. Nevertheless, the political scientist Robert Dahl has argued that elections are the critical element in the definition of democracy and the central device for ordinary citizens to exert a high degree of control over their leaders.[34]

The minimalist definition of democracy does not betray traditional or conventional conceptions of liberalism; rather, it responds to liberalism's basic commitment to guarantee citizens their formal autonomy and political and legal equality. Thus, as Henry Steiner puts it, the traditional liberal understanding of the state requires that it "protect citizens in their political organizations and activities,"[35] guaranteeing autonomy and legal equality, but does not require that it remove impediments to actual equality which may result from lack of resources and status. Steiner says it clearly:

> Choices about types and degrees of [political] participation may depend on citizens' economic resources and social status. But it is not the government's responsibility to alleviate that dependence, to open paths to political

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32. For a description of the formal transformation of South Africa from a racist state to a democracy, see Adrien K. Wing, Towards Democracy in a New South Africa, 16 Mich. J. Int'l L. 689 (1995) (reviewing Ziyad Motala, Constitutional Options for a Democratic South Africa: A Comparative Perspective (1994)).

33. Based on the gender criteria alone, most states long regarded as democratic were in fact undemocratic until recently. Women were not allowed to vote on an equal footing with men in the following states until the early twentieth century: Austria (1920); Belgium (1948); France (1944); Germany (1919); the United States (1920); and the United Kingdom (1928). See Fox, supra note 12, at 546. See also Thomas F. Mackie & Richard Rose, The International Almanac of Electoral History (3d rev. ed. 1991). Until 1948, university graduates and businessmen in the United Kingdom were allowed two votes each. Id. at 438-39.

34. See Robert R. Dahl, A Preface to Democratic Theory 125 (1956).

35. Henry J. Steiner, Political Participation as a Human Right, 1 Harv. Hum. Rts. Y.B. 77, 109 (1988) [hereinafter Steiner, Political Participation]. Steiner identifies some of these activities as "forming political parties, mobilizing interest groups, soliciting campaign funds, petitioning and demonstrating, campaigning for votes, establishing associations to monitor local government, lobbying." Id.

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> participation which lack of funds or education or status would otherwise block.[36]

In reality, of course, participation in the political process requires more than the state's permission and protection. Increasingly, states not only provide these two services but also expend enormous resources constructing the electoral machinery for participation; legislative reforms in many democracies now attempt to address historical, socioeconomic, and ethnic, racial, and gender-related barriers to participation.[37] Such interpretations of political democracy have attempted to build into their frameworks notions of social or economic democracy. In human rights law, the International Covenant on Economic, Social and Cultural Rights (ICESCR) most closely resembles this aspiration.[38]

The main focus of human rights law, however, has been on those rights and programs that seek to strengthen, legitimize, and export political or liberal democracy.[39] Inversely, most of the human rights regime is derived from bodies of domestic jurisprudence developed over several centuries in the West.[40] The emphasis, by academics and practitioners, in the development of human rights law has been on civil and political rights.[41] In fact the currency of civil and political rights has been so strong that they have become

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36. Id. at 109-10.

37. See id. at 110-11.

38. See ICESCR, supra note 8. As noted by Alston, however, the rights enumerated in the ICESCR, unlike those in the ICCPR, were "not based upon any significant bodies of domestic jurisprudence." Philip Alston, The Committee on Economic, Social and Cultural Rights, in United Nations and Human Rights, supra note 1, at 473, 490 [hereinafter Alston, ECOSOC]. Thus, with the exception of some labor-related rights, there is still little understanding of the normative content of the rights to food, education, health care, clothing, and shelter, to mention a few. See id.

39. In terms of emphasis and political importance, the two most significant human rights documents are the UDHR and the ICCPR. Although the UDHR lists a number of economic, social, and cultural rights, its first 21 articles, which include the right to own property individually, read like a manifesto for a political democracy. See UDHR, supra note 1, arts. 1-21. The ICCPR is itself mainly a repetition and elaboration of the rights and processes that liberal democracies have evolved. See ICCPR, supra note 8.

40. See Alston, ECOSOC, supra note 38, at 490. For an example, Alston notes that "phrases like 'cruel, inhuman or degrading treatment or punishment' had been the subject of in-depth judicial and academic analysis" prior to its inclusion in the ICCPR. Id.

41. Although the formal body of human rights law includes economic, social, and cultural rights, the rhetoric and practice of the human rights movement, and especially its most vocal wing, the international non-governmental organizations (INGOs), have centered on civil and political rights. The three human rights organizations most closely associated with the human rights movement, Amnesty International, the International Commission of Jurists, and Human Rights Watch, focus on state action against the individual. There is no major INGO in the West that addresses economic and social rights.

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synonymous with the human rights movement, even as the so-called second and third generation rights have attempted to make inroads into the mainstream of the discourse.[42]

There is virtual agreement that the early formulation and codification of human rights standards was dominated by Western cultural and political norms.[43] This was particularly true with the formulation and adoption of the Universal Declaration on Human Rights (UDHR), the "spiritual parent of and inspiration for many human rights treaties."[44] As one author has remarked, the West was able to "impose" its philosophy of human rights on the rest of the world because in 1948 it dominated the United Nations.[45] The minority socialist bloc abstained after it put up ineffectual resistance on grounds that economic, social, and cultural rights were downgraded.[46] More important, non-Western views were largely unrepresented because the so-called Third World at the United Nations was mainly composed of Latin American countries whose dominant worldview was European.[47] In 1948, most African and Asian states were absent from the United Nations because they were European colonies.[48] On account of this exclusivity of major cultural blocs, it was presumptuous and shamelessly ethnocentric for the UDHR to refer to itself as the "common standard of achievement for all peoples and all nations."[49]

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42. Sometimes writers and actors in human rights refer to "generations" of rights, a euphemism that variously describes ranking, acceptability, or even the order in which rights "ought" to be implemented or realized. Thus, civil and political rights are regarded as "first generation" rights while economic, social, and cultural rights are termed "second generation" rights. Group rights, such as the right to self-determination, and peoples' rights, such as the right to development, which are listed in the African Charter on Human and Peoples' Rights, are referred to as "third generation" rights. African Charter, supra note 6. Given the inadequate attention given to rights in the second and third "tiers," it seems fair to conclude that "generations" are the human rights movement's proxy for the importance it attaches to the particular category of rights. For more on these distinctions, see Buergenthal Nutshell, supra note 1, at 234-35; Jean-Bernard Marie, Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions, 7 Hum. Rts. L.J. 195 (1986).

43. See Leary, supra note 9, at 15.

44. Steiner, Political Participation, supra note 35, at 79.

45. See Cassese, supra note 1, at 31-32.

46. Id. at 31.

47. Id. at 32.

48. As Leary puts it, the drafting of the Universal Declaration of Human Rights was entrusted to the Human Rights Commission, which in turn gave the responsibility to people who were from "Western Europe or the Americas or were non-Europeans educated in the West." Leary, supra note 9, at 20.

49. UDHR, supra note 1, pmbl. Leary provides a very good summary of the origin and cultural orientation of the drafters of the UDHR. She lists the following persons as the

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A closer examination of the rights listed in both the UDHR and the International Covenant on Civil and Political Rights (ICCPR) leaves no doubt that both documents—which are regarded as the two most important human rights instruments[50]—are attempts to universalize civil and political rights accepted or aspired to in Western liberal democracies. Many articles in the Universal Declaration echo or reproduce provisions of the U.S. Constitution and the jurisprudence of Western European states such as France and the United Kingdom. The UDHR prohibits "cruel, inhuman or degrading treatment or punishment;"[51] the U.S. Constitution prohibits the infliction of "cruel and unusual punishments."[52] Other parallels include due process protections,[53] speech rights,[54] and privacy.[55] During the drafting of the ICCPR and the ICESCR, both of which were opened for signature in 1966, there was some discernable influence from the newly independent states of Africa and Asia, though the ICCPR retained its distinctly Western character.[56] Although non-Western perspectives on human rights, such as the African conceptions of peoples' rights and duties and the more celebrated right to development,[57] have acquired some notoriety in

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key drafters: Rene Cassin of France, John P. Humphrey of Canada, Eleanor Roosevelt of the United States, Hernan Santa Cruz of Chile, Charles Malik of Lebanon, P. C. Chang of China, and Fernand Dehousse of Belgium. She notes that although this group appears culturally diverse—three from the Americas, two Europeans, and two Asians—it was in reality Eurocentric. All the drafters had received their education largely from Western institutions; Chang and Malik, the only non-Westerners, were educated at Clark College and Harvard University respectively. Malik, who had taught at Harvard, even urged the inclusion of the phrase that each person is "endowed by the Creator with unalienable rights." The phrase, which was lifted from the United States Declaration of Independence, was rejected. See Leary, supra note 9, at 20. Chang referred "with approval, to eighteenth-century Western philosophical theories as the source of the declaration." Id.

50. Although the ICESCR is included in the trilogy referred to as the International Bill of Rights, it is the least prominent of the three. It has been relegated to the backwater of human rights discourse. See supra note 42.

51. UDHR, supra note 1, art. 5.

52. U.S. Const. amend. VIII.

53. U.S. Const. amends. V, VI; UDHR, supra note 1, arts. 7-11.

54. U.S. Const. amend. I; UDHR, supra note 1, art. 19.

55. U.S. Const. amend. IV; UDHR, supra note 1, art. 12.

56. The ICCPR repeated, almost verbatim, with the exception of the right to property, many of the civil and political rights enumerated in the UDHR. The most visible demonstration of the presence of emergent states of Africa, Latin America, and Asia was the inclusion of article 1, common to both the ICCPR and the ICESCR, on the group right to self-determination. See ICCPR, supra note 8, art. 1; ICESCR, supra note 8, art. 1; Leary, supra note 9, at 28.

57. In 1986, the United Nations General Assembly adopted the Declaration on the Right to Development. G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186-87, U.N. Doc. A/41/53 (1986). Leading Western states, including the United States, Germany,

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human rights debates, they remain marginal to the mainstream practice of human rights.[58] The same has been true of economic, social, and cultural rights since their relegation to the "other" human rights treaty.[59]

The purpose of this segment was to track some of the historical roots of the human rights corpus and to establish its evolution from liberal thought and political democracy. This connection leads to the conclusion that the post-1945 elaboration and codification of human rights norms has been the process of the universalization of liberalism and its outgrowth, Western political democracy. Seen in this light, the human rights movement is a proxy for a political ideology, a fact that would shear it of the pretense of non-partisanship. Although the movement's authors present it as non-ideological, and as universal and non-contentious, the human rights regime does not transcend or stand removed from politics. The human rights movement is not post-ideological, although its mantra of universal morality and timeless righteousness attempts to mask its deeply political character.

II. CONVENTIONAL DOCTRINALISM: CONTENT AND CONTEXT

Perhaps no other school in the human rights movement has been more influential in the promotion of the "universalization" of human rights norms than that of the conventional doctrinalists, even though the formal creation of human rights law is carried out by collections of states—the so-called international community—

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the United Kingdom, the Nordic countries (except Norway), and Japan, either voted against the declaration or abstained. See John Quinn, The General Assembly into the 1990s, in United Nations and Human Rights, supra note 1, at 55, 65.

58. Even Leary, who is more optimistic about the normative universalization of human rights, is careful not to overstate the influence of non-Western thinking on human rights. She notes that such thinking has "*begun* to influence Western thinking on the subject." Leary, supra note 9, at 29.

59. Opposition from the West to one human rights covenant covering all human rights—civil and political as well as economic, social, and cultural—led to the two instruments, the ICCPR and the ICESCR. Traditional Western thinking on rights, which used the Soviet bloc emphasis on economic, social and cultural rights as a pretext for opposing a single covenant, makes a distinction between "negative" and "positive" rights. Although this distinction has for the most part been demystified, civil and political rights have retained their prominence in the West because their implementation does not necessarily involve the redistribution of wealth or inception of programs that drastically curtail an individual's right to accumulate unlimited property. Cf. Donnelly, supra note 9, at 31, 49 (demonstrating that the positive-negative distinction fails to provide accurate labels for negative rights like the protection from torture, which requires positive governmental action, and the right to political participation, which seems to be "more a positive than a negative right").

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acting in concert and separately within and outside the ambit of the United Nations. It is generally accepted that the full-court press for the universalization of human rights ideals was not applied until after the Hitler atrocities half a century ago, although the development of human rights norms and ideals preceded the Holocaust. Prior to 1945, the antecedents to the human rights corpus included the 1926 Slavery Convention,[60] the work of the International Labor Organization,[61] and some opinions of the Permanent Court of International Justice.[62] After Hitler, the United Nations set out on a crusade to codify "universal" human rights norms.

The most active element in the internationalization of the human rights movement has been the so-called international non-governmental organization (INGO),[63] the movement's prime engine of growth. The most prominent INGOs in this regard are based in the West and seek to enforce the application of human rights norms internationally, particularly towards repressive states in the South. They are ideological analogues, both in theory and in method, of the traditional civil rights organizations which preceded them in the West. The American Civil Liberties Union (ACLU), one of the most influential civil rights organizations in the United States, is the classic example of the Western civil rights organization.[64] Two other equally important domestic civil rights organizations in the United States are the National Association for the Advancement

60. Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

61. Established by the League of Nations on April 11, 1919, the ILO has focused on the creation of common labor standards. For a general description of the origin and purposes of the ILO, see Human Rights Directory: Western Europe 235-36 (Laurie S. Wiseberg & Hazel Sirett eds., 1982) [hereinafter Western Europe Directory].

62. See, e.g., Advisory Opinion No. 64, Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64 (examining whether Albania violated the 1919 Minorities Treaty Between the Principal Allied and Associated Powers and Poland by prohibiting private schools for the Albanian Greek-speaking minority).

63. INGOs may be contrasted with non-governmental organizations (NGOs) which, though also referring to private, non-governmental groups, is often used to describe "domestic" or national organizations. So-called NGOs address human rights issues only in the country in which they are based.

64. Initially founded in 1920 to advocate the rights of conscientious objectors, the ACLU sees itself as the "guardian of the Bill of Rights which guarantees fundamental civil liberties to all of us." These rights include the freedoms of speech, press, and religion (First Amendment); freedom from abuses by the police, domestic spying, and other illegal intelligence activities (Fourth Amendment); equal treatment and fair play (Fifth Amendment); fair trial (Sixth Amendment); prohibition against cruel and unusual punishment (Eighth Amendment); and privacy and personal autonomy (Fourth, Fifth, and Ninth Amendments). See North American Human Rights Directory 19 (Laurie S. Wiseberg and Hazel Sirett eds., 1984) [hereinafter North American Directory].

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of Colored People (NAACP)[65] and the NAACP Legal Defense and Educational Fund (LDF).[66] Although these organizations are called civil rights groups by Americans, they are in reality human rights organizations. The historical origin of the distinction between a "civil rights" group and a "human rights" group in the United States remains unclear. The primary difference is that Western human rights groups focus on abusive practices and traditions in what they see as relatively repressive, "backward" foreign countries and cultures, while the agenda of civil rights groups concentrates on domestic issues. Thus, although groups such as Human Rights Watch publish reports on human rights abuses in the U.S., the focus of their activity is the human rights "problems" or "abuses" of other countries.[67]

In American popular culture, several assumptions are implicit in this thinking: "human rights problems" do not apply to "people like us," but rather to "backward" peoples or those who are "exotic;" these "problems" arise where the political and legal systems do not work or cannot correct themselves; and "we are lucky" and should "help those less fortunate" overcome their history of despotism. Unfortunately, this dichotomy has calcified in academic institutions where civil rights questions are taught and explored under the rubric of "American" courses while human rights offerings and activities are treated under the rubric "foreign" or "international" disciplines and classifications.[68] For example, American law school graduates who have taken courses on race, gender, employment law, sexuality, housing, or the criminal justice system probably associate those fields with civil rights, not human

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65. The NAACP, the United States' oldest civil rights organization, was founded in 1909 to seek equal treatment—the removal of racial discrimination in areas such as voting, employment, housing, business, courts, and transportation—for African-Americans through peaceful reform. See id. at 161.

66. Although today the LDF and the NAACP are separate legal entities, the LDF was founded in 1939 as the legal arm of the NAACP. It has initiated legal action in courts to challenge discrimination and promote equality in schools, jobs, the electoral system, land use, and other services and areas. Id. at 159.

67. See, e.g., Human Rights Watch, Questions and Answers 3 (undated pamphlet, on file with the *Virginia Journal of International Law*) ("We examine both how the U.S. government promoted human rights abroad and how it respects human rights at home.").

68. Human rights programs at American University (Washington College of Law), Columbia, Harvard, Virginia, and Yale, among others, have adopted this bifurcated approach: civil rights belong to courses and pursuits that explore "American" issues and dilemmas while human rights offerings concern the "foreign," the "international," the "other." Perhaps there is a fear that exploring human rights under this umbrella may blunt the importance of the civil rights courses and activities at American universities and relegate them to the margins.

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rights. This organizational format could lead to a sense of cultural superiority and may exacerbate problems of nationalism. In turn, this development could adversely affect attempts at an international consensus on human rights, as non-Western cultures see crusading human rights activists from the West as the "civilizers" that many of the activists cast themselves as.

At any rate, the half-dozen leading human rights organizations, the prototypical conventional doctrinalists, have arisen in the West over the last half-century with the express intent of promoting certain basic Western liberal values—now dubbed human rights—throughout the world, especially the non-Western world. These INGOs were the brainchildren of prominent Western civil rights advocates, lawyers, and private citizens. The International League for the Rights of Man, now the International League for Human Rights (ILHR), is the oldest such organization, founded in New York in 1942.[69] At various times it has focused on victims of torture, religious intolerance, the rights of human rights monitors at its affiliates abroad, the reunification of Eastern Europeans with relatives in the West during the cold war, and the human rights treaty state reporting system within the United Nations.[70] Roger Baldwin, the founder of the ACLU, also founded the ILHR.[71]

The ILHR itself was responsible for establishing in New York in 1975 the Lawyers Committee for International Human Rights, now known as the Lawyers Committee for Human Rights (LCHR), another of the more important Western INGOs. The LCHR claims to promote the human rights standards contained in the International Bill of Rights.[72] The New York-based Human Rights Watch (HRW)[73] was founded in 1978[74] and has developed into the most dominant American INGO working to expose violations of

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69. See North American Directory, supra note 64, at 135.

70. Id.

71. See Rita McWilliams, Who Watched Americas Watch?, 19 Nat'l Interest 45, 53 (1990). Jerome Shestack, a prominent American lawyer who long served as the President of the ILHR and is the organization's current honorary chair, was replaced in May 1996 by Scott Horton, a partner in a New York law firm. Telephone Interview with the ILHR (Sept. 13, 1996).

72. On the mandate of the LCHR, see supra note 17.

73. Human Rights Watch is divided into five geographic units covering Africa, the Americas, Asia, the Middle East, and the signatories of the Helsinki Accords. It also has five thematic projects on arms transfers, children's rights, free expression, prison conditions, and women's rights. See World Report 1995, supra note 22, at vii.

74. Id. Human Rights Watch began in 1978 with the founding of the Helsinki Watch.

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basic liberal freedoms.[75] The founder of HRW is Aryeh Neier, a former national executive director of the ACLU.[76]

The last major American INGO is the Washington DC-based International Human Rights Law Group, which was established by the Procedural Aspects of International Law Institute (PAIL), a private American organization that explores issues in international law.[77] Some American domestic civil rights NGOs are acutely aware of their pioneering role in the creation of similar organizations abroad.[78] Until recently, and to a large extent even today, none of these American INGOs focused on human rights issues in the United States, except to seek the reform of U.S. foreign policy and American compliance with aspects of refugee law.[79]

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75. HRW asserts that it "defends freedom of thought and expression, due process and equal protection of the law; it documents and denounces murders, disappearances, torture, arbitrary imprisonment, exile, censorship, and other abuses of internationally recognized human rights." Id.

76. See Aryeh Neier, Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1233, n.* (1993).

77. See North American Directory, supra note 64, at 133. PAIL itself was established in 1965 and has devoted considerable resources to the promotion of the idea of human rights. Richard Lillich, its former president, is a professor of law at the University of Virginia School of Law, and one of the leading writers on human rights. See, e.g., Richard B. Lillich, International Human Rights: Problems of Law, Policy, and Practice (2d ed., 1991); Richard B. Lillich, Preface, in Hurst Hannum et al., Materials on International Human Rights and U.S. Criminal Law and Procedure (1989); Richard B. Lillich, The Constitution and International Human Rights, 83 Am. J. Int'l L. 851 (1989); Richard B. Lillich, Invoking International Human Rights Law in Domestic Courts, 54 U. Cin. L. Rev. 367 (1985); Richard B. Lillich, The Role of the U.N. Security Council in Protecting Human Rights in Crisis Situations: U.N. Humanitarian Intervention in the Post-Cold War World, 3 Tul. J. Int'l & Comp. L. 1 (1995).

78. At a 1992 LDF symposium of public interest law NGOs from around the world, Julius Chambers, then director-counsel of the LDF, recalled how Thurgood Marshall, his most celebrated predecessor, had in 1959 helped write the Kenya Constitution, and had helped to endow it with doctrines of due process, equality, and justice. Mr. Chambers also remembered how Jack Greenberg, another predecessor, had laid the groundwork for the Legal Resource Centre of South Africa, one of that country's leading public interest law firms under apartheid. Instructively, he noted that he did not view the symposium "primarily as an occasion for the LDF to *teach* others." See NAACP Legal Defense & Education Fund, Public Interest Law Around the World 1 (1992) [emphasis added]. See also Lawyers Committee for Human Rights, The Establishment of the Right of Non-Governmental Groups to Operate, (1993) (noting the progress made in establishing human rights NGOs around the world and arguing for the removal of restrictions on NGOs to allow them to operate more freely).

79. American INGOs argue, with some justification, that there is a glut of civil rights organizations addressing civil (human) rights problems in the United States. They therefore see little purpose in duplicating the excellent work of local NGOs. This posture is self-defeating in several respects. First, charges of "imperialism" undercut the effectiveness of American INGOs, even with some of their kindred spirits in the South and the former Soviet bloc. Secondly, domestic American NGOs remain unaware of the uses

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The two other leading INGOs are located in Europe, in the United Kingdom and Switzerland. The Geneva-based International Commission of Jurists (ICJ) was "founded in 1952 to promote the 'rule of law'[80] throughout the world."[81] The ICJ has been accused of being a tool of the West in the Cold War, spending considerable resources exposing the failures of Soviet bloc and one-party states.[82] Today, however, it is regarded as a bona fide INGO, concerned with rule of law questions in the South.[83]

Lastly, the London-based Amnesty International (AI), the most powerful human rights INGO, is today synonymous with the human rights movement and has inspired the creation of many similar human rights groups around the world. It was launched by Peter Benenson, a British lawyer, writing in the May 28, 1961, issues of the London Observer and Le Monde.[84] Benenson's article, "Forgotten Prisoners," urged moral outrage and appeals for amnesty for individuals who were imprisoned, tortured, or exe-

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of the international rights regime and the solidarity of advocates elsewhere, facts which conspired to delay the ratification by the United States of major international human rights treaties. The absence of domestic U.S. NGOs from the international human rights movement served, among other things, to delegitimatize the movement in the eyes of other cultures. Nevertheless, in a rare effort, Human Rights Watch and the ACLU in 1993 produced a report on human rights abuses in the United States. See Human Rights Watch & American Civil Liberties Union, Human Rights Violations in the United States (1993). Two things were unusual about the effort: first, that an American INGO produced a human rights report on the United States, and second, that it did so in collaboration with a domestic American NGO. In a rare call, Dorothy Thomas, the director of Human Rights Watch Women's Project, has urged the use of international human rights norms in protecting human rights in the United States. Dorothy Q. Thomas, Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy, 9 Harv. Hum. Rts. J. 15 (1996).

80. This term is commonly understood to describe a state that is accountable to the governed through the application of fair and just laws enforced by an independent and impartial judiciary. See, e.g., Andrea J. Hanneman, Note, Independence and Group Rights in the Baltics: A Double Minority Problem, 35 Va. J. Int'l L. 485, 523 ("The extent to which a society protects human rights in general and minority rights in particular has been called the 'litmus test of liberty and the rule of law.'") (citing Ralf Dahrendorf, Minority Rights and Minority Rule, in Minorities: A Question of Human Rights 79, 79 (Ben Whitaker ed., 1984)).

81. Western Europe Directory, supra note 61, at 216.

82. See Issa G. Shivji, The Concept of Human Rights in Africa 34 (1989). At its inception, the ICJ was funded in part by covert CIA funds. "It followed an essentially American set of priorities in its early years, then expanded and became less politically partial." Claude E. Welch, Jr., Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organizations 163 (1995).

83. As of September 1996, the ICJ's secretary general was Adama Dieng, the Senegalese jurist who had risen from the legal officer responsible for Africa to become the organization's first non-Western head.

84. See Western Europe Directory, supra note 61, at 265.

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cuted because of their political opinions or religion.[85] The recipient of the 1977 Nobel Peace Prize, AI claims that its object is "to contribute to the observance throughout the world of human rights as set out in the Universal Declaration of Human Rights"[86] through campaigns to free prisoners of conscience;[87] to ensure fair trials within a reasonable time[88] for political prisoners; to abolish the death penalty, torture, and other cruel treatment of prisoners;[89] and to end extrajudicial executions and disappearances.[90]

Some structural factors provide further evidence of the ideological orientation of INGOs. They concern the sources of their moral, financial, and social support. The founding fathers of major INGOs—they have all been White males—were Westerners who either worked on or had an interest in domestic civil and political rights issues; they sought the reform of governmental laws, policies, and processes to bring about compliance with American and European conceptions of liberal democracy and equal protection. Although the founders of the INGOs did not explicitly state their "mission" as a crusade for the globalization of these values, they nevertheless crafted organizational mandates that promoted liberal ideals and norms. In any case, the key international human rights

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85. See Ian Martin, Lecture by the Edward A. Smith Visiting Fellow presented by the Harvard Law School Human Rights Program, (Apr. 14, 1993), in The New World Order: Opportunity or Threat for Human Rights? at 4-5 [hereinafter New World Order]. From 1986-1992, Martin was the secretary general of Amnesty International. Benenson's article accompanied photos of six political prisoners: three were imprisoned in Romania, Hungary, and Czechoslovakia; the other three were a Greek communist and unionist imprisoned in Greece, an Angolan doctor and poet incarcerated by the Portuguese colonial rulers in Angola, and the Rev. Ashton Jones, an American who had repeatedly been beaten and jailed in Louisiana and Texas for advocating the civil rights of Black Americans. Id. Although AI now focuses most of its attention on Africa, Central America, and South America, the trigger for its creation was, ironically, the official conduct of Soviet-bloc and Western governments, including the United States.

86. Statute of Amnesty International arts. 1 and 2, reprinted in Amnesty International, Amnesty International Report, app. II at 332 (1994) [hereinafter AI Report].

87. Prisoners of conscience are individuals detained anywhere for their beliefs or because of their ethnic origin, sex, color or language who have not used or advocated violence. Id. at 333. It is interesting to note that Nelson Mandela and many in the African National Congress were not regarded as prisoners of conscience by this standard. See Peter Worthington, Dancing to Castro's Tune, Toronto Sun, Aug. 16, 1994, at 11, available in LEXIS, News Library, ARCNWS File; Sousa Jamba, An Ex-Convict Runs out of Convictions, The Times, Dec. 9, 1993, available in LEXIS, News Library, ARCNWS File. For a more comprehensive discussion of the reasons and motivations behind the narrow mandate of Amnesty International, see Peter R. Baehr, Amnesty International and Its Self-Imposed Limited Mandate, 12 Neth. Hum. Rts. Q. 5 (1994).

88. AI Report, supra note 86, at 332.

89. Id. at 332-33.

90. Id. at 333.

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instruments such as the UDHR and the ICCPR pierced the sovereign veil for the purposes of protecting and promoting human rights. The mandates of INGOs are lifted, almost verbatim, from such instruments. AI also deploys jurisprudential arguments developed in the context of Western liberal democracy to cast the death penalty as the "ultimate form of cruel, inhuman and degrading punishment."[91]

The pool for the social support of INGOs has therefore come from the private, non-governmental, and civil society segments of the industrial democracies: prominent lawyers, academics at leading universities, the business and entertainment elite, and other professionals. In the United States, these circles are drawn from the liberal establishment; the overwhelming majority vote for and support the Democratic Party and its politics and are opposed to the Republican Party. The board of directors of Human Rights Watch, for example, counts among its members such luminaries as Robert Bernstein, formerly the top executive at Random House; Jack Greenberg, the former director-counsel at LDF and provost at Columbia University; and Alice Henkin, spouse of the acclaimed professor of international law, Louis Henkin, and an important human rights personality in her own right.[92] The board of directors of the Lawyers Committee for Human Rights includes its chair, Norman Dorsen, the prominent New York University law professor, former ACLU president, and First Amendment expert; Louis Henkin; Sigourney Weaver, the actress; Kerry Kennedy Cuomo, the daughter of the late Robert F. Kennedy and the founder of the Robert F. Kennedy Memorial Center for Human Rights; Deborah Greenberg, the spouse of Jack Greenberg and a professor at Columbia Law School; Marvin Frankel, formerly the Chairman of the Board and a named partner in a major New York City law firm; and Tom Bernstein, the Committee's president, a senior business executive and scion of Robert Bernstein.[93] The board of directors of the International Human Rights Law Group is composed of sim-

91. AI Report, supra note 86, at 21. In addition, AI attacks the "arbitrary and irrevocable nature of the death penalty," its use as a "tool of political repression," and its disproportionate imposition on "the poor and the powerless." It disagrees with the argument that the death penalty has a deterrent effect on crime. Id.

92. See World Report 1995, supra note 22, at 387.

93. Lawyers Committee for Human Rights, Critique: Review of the U.S. Department of State's Country Reports on Human Rights Practices 1994, at 305 (1995). Telephone Interview with Lawyers Committee for Human Rights (Sept. 13, 1996).

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ilar personalities.[94] These boards are predominantly White and male and almost completely American; some, such as those of the Lawyers Committee or HRW, typically have one or several African-Americans or a member of another non-White minority.

The boards of the European-based INGOs, the ICJ and AI, tend to differ, somewhat, from American INGOs, although they too are dominated by Westerners, Western-trained academics, professionals, and policymakers, or non-Westerners whose worldview is predominantly Western. Thus, even these Asians and Africans—who, though non-White, nevertheless "think White" or "European"—champion, usually uncritically, the universalization of the human rights corpus and liberal democracy. In 1994, for example, the seven members of the executive committee of the ICJ included a German, an Australian, a Brazilian (a Westerner), and four establishment figures from India, Ghana, Sri Lanka, and Jordan. The non-Westerners in the group were prominent legal professionals steeped in either the common law or the civil law traditions.[95] AI's International Executive Committee, its principal policymaking organ, is arguably "more global looking"—it includes a number of members from the South—although it too has historically been dominated by Westerners.[96] The staffs of all the major INGOs, including AI's headquarters in London, are similarly dominated by Westerners, although both AI and ICJ now have African heads.[97]

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94. See International Human Rights Law Group, Ethiopia in Transition: A Report on the Judiciary and the Legal Profession, front leaf (1994) [hereinafter Ethiopia in Transition]. To "broaden" its international credibility, the Law Group has constituted an International Advisory Council which includes noted activists, scholars, and pro-establishment figures from Asia, Africa, and Latin America. Id.

95. For a list of the members of the ICJ, see International Commission of Jurists, The Civilian Judicial System in the West Bank and Gaza: Present and Future 134-35 (1994). The president of the ICJ was Joaquim Ruiz-Gimenez, a Spanish professor of law and a former Ombudsman of Spain. Id. at 134.

96. See Henry J. Steiner, Diverse Partners: Non-Governmental Organizations in the Human Rights Movement 61-64 (1991) [hereinafter Steiner, Diverse Partners].

97. Id. Pierre Sané, a Senegalese, became AI's first non-European secretary-general in October 1992. Amnesty International, Press Release, Amnesty International Announces Appointment of New Secretary General, Oct. 1, 1992. Adama Dieng, also a Senegalese, became the secretary-general of the ICJ in 1991. Although both AI and the ICJ accepted non-Western heads, the choices were more "safe" and less radical than they initially appeared. Sané came from the International Development Research Centre, a Canadian development aid organization, for which he had worked since 1978. Dieng was working for the ICJ before his appointment. Both were nationals of Senegal, with a reputation in the West as a stable formal democracy, and one of the most Francophillic countries in Africa. Leopold Sedar Senghor, Senegal's first president, whose wife was French, was educated in France and later appointed as the first black African to the *Academie Francaise*, the pinnacle of French culture. The forty "immortals," as the members of the *Academie* are

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The selection of the boards and staffs of INGOs seems designed to guard against individuals, even if they are Westerners, who may question the utility or appropriateness of the conventional doctrinalist approach. This vetting perpetuates their narrow mandates and contradicts the implied and stated norms of diversity and equality, the raison d'etre for the existence of these organizations.[98]

The relationship between social, financial, and other material support provides further evidence of the political character of INGOs. Except for AI, which relies heavily on membership dues, most INGOs are funded by a combination of foundation grants, private donations, corporations, businesses, and governments.[99] While most do not accept government funds, some, among them the ICJ and the International Human Rights Law Group, have accepted financial support from governmental sources such as the United States Agency for International Development (USAID) and its Canadian and Nordic counterparts.[100] Those who reject government funds cite concerns for their independence of action and thought. It seems fair to conclude that to be considered for acceptance financial support must come from an industrial democracy with a commitment to promoting human rights abroad; presumably, support from Saudi Arabia or Zaire, clearly authoritarian states, would be unacceptable.

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known, are chosen for their contribution to the legacy of French culture and statecraft. See generally Janet G. Vaillant, Black, French, and African: A Life of Leopold Sedar Senghor (1990).

98. When INGOs engage Southerners, it is ordinarily for area-specific responsibilities, usually their native region. For example, Africa Watch, the division of Human Rights Watch that addresses sub-Saharan African human rights problems, has been headed by Africans since its founding in 1988. Similarly, Americas Watch has been headed by Latin Americans virtually since its inception in 1981. This author, an African, was in 1989-91 the director of the Africa Project at the Lawyers Committee for Human Rights, having succeeded Rakiya Omaar, another African. This "ghettoization"—conscious or not—seeks to legitimize the organization in the particular region while retaining its commitment to Western liberal values. It also "pigeon-holes" non-Westerners as capable of addressing issues in only their native region and incapable of dealing with questions from other regions. In effect, these hiring patterns leave the impression that only Westerners have the ability to develop a "universal" outlook.

99. AI categorically states that "no money is sought or accepted from governments." AI Report, supra note 86, app. VIII at 352. HRW states that it "accepts no government funds, directly or indirectly." See World Report 1995, supra note 22, at vii.

100. In 1993 this author led a USAID-funded "rule of law" study mission to Ethiopia for the International Human Rights Law Group and wrote a report on the mission's findings. See Ethiopia in Transition, supra note 94.

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The value of the board of directors is critical for groups that rely on private funding. Those networks and associations signify an INGO's reputation and acceptability by political and business elites. In the past decade, some INGOs, especially those based in the United States, have devised a fund-raising gimmick. At an annual dinner they present an award to a noted activist from a repressive country in the South or to a Westerner with superstar quality, such as Senator Edward Kennedy or George Soros, the philanthropist, and invite well-to-do, if not wealthy, citizens, corporations, law firms, and foundations to "buy a table"—a euphemism by which it is meant an invitee purchases the right to the dinner by reserving a table for a certain number of guests for a substantial donation. This tapestry of social and business ties, drawn from leading Americans who believe in liberal values and their internationalization through the human rights regime, underlines the agenda of INGOs.[101]

Substantively, conventional doctrinalists stress a narrow range of civil and political rights, as is reflected by the mandates of leading INGOs like Amnesty International and Human Rights Watch. Throughout the Cold War period, INGOs concentrated their attention on the exposure of violations of what they deemed "core" rights in Soviet bloc countries, Africa, Asia, and Latin America. In a reflection of this ideological bias, INGOs mirrored the position of the industrial democracies and generally assumed an unsympathetic, and at times, hostile posture towards calls for the expansion of their mandates to include economic and social rights.[102]

In the last few years since the collapse of the Soviet bloc, however, several INGOs have started to talk about the "indivisibility" of rights; a few now talk about their belief in the equality of the ICESCR and the ICCPR, although their rhetoric has not been matched by action and practice.[103] Many, in particular Human

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101. In 1986, for example, the Lawyers Committee for Human Rights honored President Corazon Aquino of the Philippines for "her achievement in leading the people of her nation to peacefully reclaim democracy." See Lawyers Committee for Human Rights, 10th Anniversary Annual Report (1988). In 1987, it honored Robert Bernstein, senior executive at Random House and the founder of Human Rights Watch. NBC news anchor Tom Brokaw was the master of ceremonies at the 600-guest event which attracted prominent businessmen and lawyers. Id.

102. See Aryeh Neier, Human Rights, in The Oxford Companion to Politics of the World 401, 403 (Joel Krieger et al. eds., 1993).

103. Of all American INGOs, the International League for Human Rights (ILHR) has, until recently, taken the most favorable position towards economic and social rights. Testifying before the U.S. Congress in 1988, Jerome Shestack, the ILHR president,

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Rights Watch, for a long time remained hostile, however, to the recognition of economic and social rights as "rights." HRW, which considered such rights "equities," instead advanced its own nebulous interpretation of "indivisible human rights" which related civil and political rights to survival, subsistence, and poverty, "assertions" of good that it did not explicitly call rights.[104] It argued that subsistence and survival are dependent on civil and political rights, especially those related to democratic accountability.[105] According

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attacked American foreign policy as deeply flawed because of its omission of economic and social rights. See Recent Developments in U.S. Human Rights Policy: Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 100th Cong., 2d Sess. 64-65 (1988) (statement of Jerome Shestack, President, ILHR). Another American INGO, the Lawyers Committee for Human Rights, has (at least since 1988) called for the ratification of the ICESCR, although it has not taken any concrete steps in its monitoring, reporting, and advocacy to underline the importance of economic and social rights. See Lawyers Committee for Human Rights, Human Rights and U.S. Foreign Policy: Report and Recommendations 39 (1988); Lawyers Committee for Human Rights, Human Rights and US Foreign Policy: Report and Recommendations 46 (1992). More recently, the LCHR stated in a position paper arguing for the ratification of the ICESCR, that it believed "strongly that the two sets of rights (economic, social and cultural, and civil and political) are inseparable, and of equal importance. Neither can claim priority over the other." See Lawyers Committee for Human Rights, United States Draft Human Rights Action Plan: A Commentary 5 (June 1993) [hereinafter LCHR, Draft Action Plan Commentary]. The Lawyers Committee has stressed elsewhere that ratification of the ICESCR would recognize as rights what is already American domestic practice through historical evolution. See Lawyers Committee for Human Rights, The International Covenant on Economic, Social and Cultural Rights: The Case for US Ratification (June 1993) [hereinafter Lawyers Committee, ICESCR Ratification].

104. See Human Rights Watch, Indivisible Rights: The Relationship of Political and Civil Rights to Survival, Subsistence and Poverty (1992) [hereinafter HRW, Indivisible Rights]. In 1993, Aryeh Neier, the former executive director of HRW, expressed his opposition to the deployment of rights rhetoric to economic and social concerns:

> When it comes to the question of what are called economic rights, I'm on the side of the spectrum which feels that the attempt to describe economic concerns as rights is misguided. I think that when one expresses this opinion, it is often thought that one is denigrating the significance of economic misery and inequities. I would like not to be accused of that. I regard economic equity and economic misery as matters of enormous significance. I just don't think that it's useful to define them in terms of rights.

Aryeh Neier, Remarks to East Asian Legal Studies & Human Rights Program Symposium (Harvard Law School) (May 8, 1993), in Human Rights and Foreign Policy: A Symposium 16 (1994). For a critique of NGOs and their restrictive mandates, see James Gathii & Celestine Nyamu, Note, Reflections on United States-based Human Rights NGOs' Work on Africa, 9 Harv. Hum. Rts. J. 285, 291 (1996).

105. See HRW, Indivisible Rights, supra note 104, at vi-vii. One of the most coherent rationalizations of the opposition to economic and social rights was expressed in a meeting of American INGOs:

> One participant felt strongly that it would be detrimental for U.S. human rights NGOs to espouse the idea of economic, social and cultural rights. Although they refer to important issues, they concern distributive justice rather than corrective justice, like civil and political rights. But distributive justice is a matter of policy,

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to this view, civil and political rights belong to the first rank because the realization of other sets of concerns or rights, however they are termed, depend on them.[106]

In September 1996, however, Human Rights Watch tentatively abandoned its long-standing opposition to the advocacy of economic and social rights.[107] It passed a highly restrictive and qualified one-year policy—effective January 1997—to investigate, document, and promote compliance with the ICESCR. Under the terms of the new policy, HRW's work on the ICESCR will be limited to two situations: where protection of the ICESCR right is "necessary to remedy a substantial violation of an ICCPR right,"[108] and where "the violation of an ICESCR right is the direct and immediate product of a substantial violation of an ICCPR right."[109] Furthermore, HRW will only intervene to protect ICESCR rights where the violation is a "direct product of state action, whether by commission or omission;"[110] where the "principle applied in articulating an ICESCR right is one of general applicability;"[111] and where "there is a clear, reasonable and practical remedy that HRW can advocate to address the ICESCR violation."[112]

While an important step by HRW, this policy statement can be seen as a continuation of the history of skepticism toward economic and social rights HRW has long demonstrated; it sees economic and social rights only as an appendage of civil and political rights. Its construction seems to condition ICESCR rights on ICCPR rights—in other words, economic and social rights do not

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> rather than principles; and human rights NGOs must deal with principles, not policies. Otherwise, their credibility will be damaged. Supporting economic demands will only undermine the ability of NGOs to promote civil and political rights, which are indispensable.

M. Rodriguez Bustelo & Philip Alston, Report of a Conference held at Arden House (1986) 26 (unpublished), quoted in Philip Alston, U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy, 84 Am. J. Int'l L. 365, 390 n.107 (1990).

The credibility of American INGOs to which the speaker referred was unlikely to be credibility among those whose economic and social rights are denied. It seems fair to suppose that the concern here was the reputation of NGOs with the governments of industrial democracies and the elites who support the INGO community.

106. HRW, Indivisible Rights, supra note 104, at vi-vii.

107. Human Rights Watch, Human Rights Watch's Proposed Interim Policy on Economic, Social, and Cultural Rights, Sept. 30, 1996.

108. Id.

109. Id.

110. Id.

111. Id.

112. Id.

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exist outside the realm of civil and political rights. Thus, one interpretation of the HRW policy could be that civil and political rights are the fundamental, primary rights without which other rights are less meaningful and unattainable. The policy also continues HRW's stress on state-related violations, an orientation that overlooks other important violators, such as businesses and international corporations. What is important about the policy, however, is the commitment by the largest and most influential American INGO to begin advocacy of economic and social rights. No other major INGO has gone that far in its practical work. Nonetheless, the policy is experimental and may be revised or terminated in a year.[113]

Steiner has put the character of INGOs succinctly:

> [T]he term "First World" NGOs both signifies an organization's geographical base and typifies certain kinds of mandates, functions, and ideological orientations. It describes such related characteristics as a concentration on civil and political rights, a commitment to fair (due) process, an individualistic rather than group or community orientation in rights advocacy, and a belief in a pluralist society functioning within a framework of rules impartially applied to protect individuals against state interference. *In a nutshell, "First World" NGOs means those committed to traditional Western liberal values associated with the origins of the human rights movement.* Many of these NGOs work exclusively within their home countries, but the "First World" category also includes most of the powerful international NGOs that investigate events primarily in the Third World.[114]

Traditionally, the work of INGOs has typically involved investigation,[115] reporting,[116] and advocacy.[117] Investigation usually takes

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113. Id. HRW is unlikely to expand this mandate to cover more ICESCR rights for a number of reasons, including the lack of adequate human resources. Telephone Interview with Kenneth Roth, Executive Director, Human Rights Watch (Oct. 8, 1996).

114. Steiner, Diverse Partners, supra note 96, at 19 (emphasis added). The ACLU and the LDF are typical domestic "First World" NGOs. HRW, AI, and other INGOs fit Steiner's categorization.

115. An investigation, known as a human rights fact-finding mission, is conducted by the staffs of INGOs who typically spend anywhere from several days to a number of weeks in a "Third World" country interviewing victims of repression, government officials, local activists, local media, and academics. See generally Diane F. Orentlicher, Bearing Witness: The Art and Science of Human Rights Fact-Finding, 3 Harv. Hum. Rts. J. 83 (1990).

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place in a "Third World" country while reporting and advocacy aim at reforming policies of industrial democracies and intergovernmental agencies to trigger bilateral and multilateral action against the repressive state. Some INGOs now go beyond this denunciatory framework and work to foster and strengthen processes and institutions—rule of law, laws and constitutions, judiciaries, legislatures, and electoral machineries—that ensure the protection of civil and political rights.[118] Although the ideological commitment of these INGOs seems clear through their mandates and work, they nevertheless cast themselves as non-ideological. They perceive themselves as politically neutral modern-day abolitionists whose only purpose is to identify "evil" and root it out. Steiner again notes that:

> Although committed to civil-political rights and in this sense taking clear moral and political positions, First World NGOs prefer to characterize themselves as above the play of partisan politics and political parties, and in this sense as apolitical . . . . Their primary self-image is that of monitors, objective investigators applying the consensual norms of the human rights movement to the facts found. They are defenders of legality.[119]

Thus, although INGOs are "political" organizations that work to vindicate political and moral principles that shape the basic characteristics of a state, they consciously present themselves as disinterested in the political character of a state. When HRW asserts that it "addresses the human rights practices of governments of all political stripes, of all geopolitical alignments, and of all ethnic and

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116. Reporting involves compiling data and information from the fact-finding mission and correlating it to human rights standards to bring out discrepancies and disseminating it through reports or other media. This method is also called "shaming" because it spotlights the offending state to the international community. See, e.g., Lawyer's Committee for Human Rights, Zimbabwe: Wages of War: A Report on Human Rights (1986); World Report 1995, supra note 22.

117. This includes lobbying governments and international institutions to use their leverage to alleviate violations.

118. For example, according to its statute, Amnesty International works to "promote as appears appropriate the adoption of constitutions, conventions, treaties and other measures which guarantee the rights contained in the provisions referred to in Article 1 hereof." AI Report, supra note 86, app. II at 333. The International Human Rights Law Group undertakes rule of law assessments which aim at identifying institutional weaknesses and proposing structural reforms. See generally Ethiopia in Transition, supra note 94.

119. Steiner, Diverse Partners, supra note 96, at 19.

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religious persuasions,"[120] it is anticipating charges that it is pro-Western, pro-capitalist, and unsympathetic to Islamic and other non-Western religious and political traditions. The first two charges could have been fatal to a group's credibility at the height of the cold war. In reality, however, INGOs have been highly partial: their work has historically concentrated on those countries that have not attained the stable and functioning democracies of the West, the standard for liberal democracy. Target states have included the Soviet bloc and virtually the entire South, where undemocratic or repressive one-party state and military dictatorships have thrived.

The content of the work of INGOs reveals their partiality as well. The typical INGO report is a catalogue of abuses committed by a government against liberal values. As Steiner notes:

> Given the ideological commitments of these NGOs, their investigative work naturally concentrates on matters such as governmental abuses of rights to personal security, discrimination, and basic political rights. By habit or established practice, NGOs' reports stress the nature and number of violations, rather than explore the socioeconomic and other factors that underlie them.[121]

Reports further document the abridgement of the freedoms of speech and association, violations of due process, and various forms of discrimination.[122] Many INGOs fear that explaining why abuses occur may justify them or give credence to the claims of some governments that civil and political rights violations take place because of underdevelopment. Such an argument, if accepted, would destroy the abolitionists' mission by delaying, perhaps indefinitely, the urgency of complying with human rights standards. Abolitionists fear that this argument would allow governments to continue repressive policies while escaping their obligations under human rights law. INGOs thus demand the immediate protection and respect of civil and political rights

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120. See World Report 1995, supra note 22, at vii. For a systematic explanation of the mandate, structure, and objectives of Human Rights Watch, see Human Rights Watch, Human Rights Watch: Questions and Answers, supra note 67.

121. Steiner, Diverse Partners, supra note 96, at 19.

122. Virtually all reports by INGOs are catalogues of cruelties and abominations of civil and political rights. See, e.g., Lawyers Committee for Human Rights, Promise Unfulfilled: Human Rights in Tunisia Since 1987 (1993); Alice Jay, Persecution by Proxy: The Civil Patrols in Guatemala (Robert F. Kennedy Memorial Center for Human Rights, Kerry K. Cuomo et al. eds., 1993); Middle East Watch, Human Rights in Syria (1990).

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regardless of the level of development of the offending state. By taking cover behind the international human rights instruments, INGOs are able to fight for liberal values without appearing "partisan," "biased," or "ideological."

Conventional doctrinalists also perpetuate the appearance of objectivity by explicitly distinguishing themselves from agencies, communities, and government programs that promote democracy and democratization. The "democracy" and "human rights" communities see themselves in different lights.[123] The first is made up of individuals and institutions[124] devoted to "democracy assistance programs" abroad, while the second is primarily composed of INGOs.[125] The human rights community has created a law-versus-politics dichotomy through which it presents itself as the guardian of international law, in this case human rights law, as opposed to the promoter of the more elusive concept of democracy, which it sees as a political ideology.[126] A complex web of reasons, motivations, and contradictions permeate this distinction.

The seeds of the dichotomy are related to the attempt by the human rights community not to "side" with the two protagonists of the Cold War, and in particular Ronald Reagan's crusade against communism and his efforts to pave the way for democracy and free markets across the globe.[127] The human rights community, whose activists and leaders are mostly Democrats or sympathetic to the

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123. For a comprehensive journalistic account of the differences between the two communities, see Thomas Carothers, Democracy and Human Rights: Policy Allies or Rivals?, Wash. Q., Summer 1994, at 109 [hereinafter Enlarging Democracy].

124. These include governmental agencies such as USAID or their European and Canadian equivalents, quasi-governmental and non-governmental organizations, programs at major Western universities, policy institutes, foundations, and academic and policy specialists. Id. at 110.

125. Although INGOs constitute the core of this group, the community also draws from government agencies—especially in the state departments or foreign ministries—universities, development institutes, and law firms. Id.

126. Id. at 111.

127. During Reagan's terms in office, the United States was criticized quite heavily for its strong-arm tactics, such as those employed in support of the Nicaraguan Contras or the invasion of Grenada, that Reagan frequently used to defend U.S. strategic and "vital" interests, but did not use against U.S. *allies* to enforce compliance with human rights norms. See, e.g., Joanne Omang, Human-Rights Groups Hit 'Narrow' U.S. View, Wash. Post, Dec. 30, 1987, at A7 (reporting on the critical appraisal of the Reagan administration human rights policy by human rights groups); Michael Posner, Reagan Becomes a Force for Rights, N.Y. Times, Mar. 16, 1986, § 4 at 27 (criticizing the Reagan administration's lack of enthusiasm for promotion of human rights); Kenneth Roth, Inconsistency is Mark of Reagan Latin Policy, N.Y. Times, Aug. 17, 1988, at A22 (letter to the editor criticizing administration's unwillingness to censure human rights violations among its "democratic" allies).

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Democratic Party, in the case of the United States, or Social Democrats and Labor Party sympathizers in Europe—liberals or those to the left-of-center in Western political jargon—viewed with alarm Reagan's and Margaret Thatcher's push for free markets and support for any pro-Western government, notwithstanding its human rights record. This hostility was exacerbated by the Reagan administration's attempts to reverse the rhetorical prominence that the Carter administration had given to human rights in American foreign policy.[128] Although INGOs delighted in Reagan's opposition to communist rule within the Soviet bloc—their own human rights reports on Soviet bloc countries were scathing—they sought "impartiality" and a "principled" use by the administration of human rights as a tool of foreign policy.[129] INGOs also feared that "democracy programs" would focus only on elections without entrenching basic civil and political rights.[130] In addition, INGOs believed that the focus on democracy blurred the focus on violators and dulled the clarity of physical violations of rights.

The differentiation between democratic and free market crusades and human rights had another advantage: Western governments and human rights groups could play "good cop, bad cop" roles in the spread of Western liberal values. While the West in bilateral agreements and projects opened up previously closed or repressive, one-party societies to markets and "encouraged" democratization, human rights groups would be unrelenting in their assault of the same government for violating civil and political rights. Ordinarily, staffs of INGOs consulted extensively with the State Department or relevant foreign ministry, Western diplomats[131] in the "repressive" state, and elements of the United Nations charged with human rights oversight, such as the Commission on Human Rights, the Committee Against Torture, and the Human Rights Committee.

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128. INGOs charged the Reagan administration with the perversion of Carter's human rights policy by applying it almost exclusively to communist states. By the end of his second term, however, INGOs started to admit that Reagan's policy had evolved to institutionalize human rights as a fixed concern of U.S. policy. See Human Rights Watch & Lawyers Committee for Human Rights, The Reagan Administration's Record on Human Rights in 1988, at 1 (1989).

129. See id. at 11-12.

130. See LCHR, Draft Action Plan Commentary, supra note 103, at 4.

131. Meetings at the request of INGOs with State Department officials responsible for policies in particular countries are indispensable to INGOs, whose clout often comes from their association with rich and powerful Western states. Ordinarily, INGO fact-finding missions also meet with Western diplomats to raise "concerns" and seek "inside information" about political issues in the country.

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Other factors indicate the commitment of INGOs to liberal democracy as a political project. At least one American NGO, the Lawyers Committee for Civil Rights Under Law, a domestic NGO with an INGO dimension, expressly linked the survival of its international operations to the "attainment" of democracy by, for example, shutting down its Southern Africa Project after the 1994 South African elections. Some INGO reports explicitly lament the failure of democratic reform.[132] They defend and seek to immortalize pro-democracy activists in repressive states.[133] At least one former leader of an INGO recognizes that the distinction made between democracy and human rights is a facade:

> This determination to establish impartiality in the face of human rights violations under different political systems led Amnesty International to shun the rhetorical identification of human rights with democracy. But in fact the struggle against violations, committed mostly by undemocratic authoritarian governments, was closely bound up with the struggle for democracy. Thousands of prisoners of conscience for whom Amnesty International worked in its first three decades were political activists challenging the denial of their rights to freedom of expression and association.[134]

Recently, some INGOs have started seeking the deployment of the resources of other institutions, in addition to those of the United Nations, in their advocacy for liberal values. The Lawyers Committee for Human Rights, for example, has instituted a project that explores ways of encouraging international financial institutions such as the World Bank to build human rights concerns into their policies.[135] Perhaps INGOs should openly acknowledge the inescapable and intrinsic linkage between human rights and

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132. See, e.g., Amnesty International, Zaire: Violence Against Democracy 23 (1993); Africa Watch, Zaire: Two Years Without a Transition 45-46 (1992).

133. The Robert F. Kennedy Memorial Center for Human Rights, for example, has often given its annual award to pro-democracy activists, including Gibson Kamau Kuria of Kenya, a leading figure in the struggle to end repressive one-party rule by introducing multiparty democracy in his country. See Robert F. Kennedy Memorial Center for Human Rights, Justice Enjoined: The State of the Judiciary in Kenya (1992); Makau Mutua, Confronting the Past: Accountability for Human Rights Violations in Malawi (Robert F. Kennedy Memorial Center for Human Rights, 1994).

134. New World Order, supra note 85, at 6.

135. See Governance and Human Rights, supra note 24, at 2-3.

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democracy, a fact consciously recognized by quasi-governmental agencies in the North.[136]

III. THE CONCEPTUALIZERS: CONSTITUTIONALIZING HUMAN RIGHTS

Constitutionalists, as the label suggests, see, or would like to see, the human rights corpus as a constitutional framework: a set of norms, ideals, and principles—moral, philosophical, legal, even cultural—that cohere to determine the fundamental character of a state and its society. They do not openly distinguish or distance themselves from doctrinalists whom they see as the human rights movement's critical core, its foot soldiers, those on whom the practical advocacy, proselytization, and universalization of its creed depend. Rather, constitutionalists are the "thinking" corps of the movement; as its ideologues they provide intellectual direction and rigor. They explore and explain issues relating to the movement's origin, its philosophical and historical bases, its normative content, and the connections among social, political, and cultural structures and values, as well as the questions that arise from the norms' enforcement and internationalization. When constitutionalists critique the human rights corpus and its movement, it is in language that is internal and "friendly" to the discourse, that is, conversations which are meant to sharpen the movement's focus, expand its influence, and bare its dilemmas. Such critiques explore moral and political dilemmas, normative conflicts within the corpus, the scope of the movement, and differences in the strategies deployed in the vindication of the movement's values. Constitutionalists were among the founders of INGOs and many serve on their boards.[137]

In this section, I will explore the works of a number of leading constitutionalists in order to extract and underline the basic messages and themes they advance to create and crystallize what I call the "defining" character of the human rights movement. Principal among the constitutionalists has been Louis Henkin.[138] Per-

136. See, e.g., David Gillies, Human Rights, Democracy and "Good Governance": Stretching the World Bank's Policy Frontiers (1993) (report of the Canadian International Centre for Human Rights and Democratic Development).

137. Examples include Professor Louis Henkin, who serves on the board of directors of the Lawyers Committee for Human Rights, and Professor Norman Dorsen, who chairs the Lawyers Committee board of directors.

138. Some of Louis Henkin's human rights works include: Louis Henkin, The Age of Rights (1990) [hereinafter Henkin, Age of Rights]; Louis Henkin, The Rights of Man Today (1978); Human Rights: An Agenda for the Next Century (Louis Henkin & John L. Hargrove eds., 1994).

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haps more than any other proponent in this school, Henkin has combined extensive and authoritative scholarship with active association with the "nerve center" of the American human rights community in New York.[139] Among others in this school, I will also briefly explore the work of Philip Alston,[140] Henry Steiner,[141] and Thomas Franck.[142] I contend here that while these thinkers do not completely agree on the content or even the normative importance of different human rights, they nevertheless are generally united in their vision of the political society intended by the human rights corpus.

In the preface to *The Age of Rights*, a collection of essays that crystallizes his ideas on human rights, Henkin underlines his belief in the omnipotence of human rights by elevating them to a near-mythical, almost biblical plateau. To him, the universality of the acceptance of the idea of human rights sets it apart from all other ideas and puts it in a most distinctive place in modern times. He boldly states:

> Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, has been approved by virtually all governments representing all societies. Human rights are enshrined in the constitutions of virtually every one of today's 170 states—old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian, and totalitarian; market economy, socialist, and mixed; rich and poor, developed, developing, and less developed. Human rights is the subject of numerous international

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139. Except for the International Human Rights Law Group, all the major American INGOs are based in New York. These include the Lawyers Committee for Human Rights and Human Rights Watch. Amnesty International and the International League for Human Rights are also based there. Key American (domestic) human rights NGOs such as the ACLU and LDF are also based in New York. See generally North American Directory, supra note 64.

140. Alston's works include: Alston, ECOSOC, supra note 38; Philip Alston, Conjuring Up New Human Rights: A Proposal for Quality Control, 78 Am. J. Int'l L. 607 (1984).

141. Steiner's writings include: Steiner, Diverse Partners, supra note 96; Steiner, Political Participation, supra note 35; Henry J. Steiner, Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities, 66 Notre Dame L. Rev. 1539 (1991) [hereinafter Steiner, Autonomy Regimes]; Henry J. Steiner, The Youth of Rights, 104 Harv. L. Rev. 917 (1991) (reviewing Henkin, Age of Rights, supra note 131) [hereinafter Steiner, Youth of Rights].

142. See Franck, supra note 12.

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> agreements, the daily grist of the mills of international politics, and a bone of continuing contention among superpowers.[143]

This celebratory and triumphant passage uses a quantitative approach—the idea's dissemination and diffusion to most corners of the earth—as the standard for determining the superiority of human rights over other ideas.[144] But the quantitative approach, while persuasive, has its own problems. One might plausibly argue, based on this criterion, that ideas about free markets as the engine of economic development, among others, are equally, if not more universally accepted, than human rights. Furthermore, depending on how universal acceptance is calibrated, and who the participants are, might it not have been possible to argue at the close of the last century that colonialism enjoyed a similar status?

In any case, it seems highly doubtful that many of the states which constitute the international community are representative of their societies and cultures. It is certainly questionable whether the homage such states pay to human rights is part of a cynically manipulative strategy to be seen "to belong" among the "civilized" members of the international community. Universality obtained at the expense of genuine understanding and commitment cheapens and devalues the idea of human rights. Ultimately, such universality is of little normative value in the reconstruction of societies.

Like other Western pioneers of the concept of human rights, Henkin rejects claims of "cultural relativism" or a multicultural approach to the construction of human rights.[145] He accuses those who advocate cultural and ideological diversity in the creation of the human rights corpus of desiring a vague, broad, ambiguous, and general text of human rights.[146] He sees such an approach as fatal because it would allow different societies to read into human

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143. Henkin, Age of Rights, supra note 138, at ix.

144. Henkin acknowledges that although the universal consensus on human rights may be formal, even hypocritical and cynical in some societies, it is important that it is the idea that

> has commanded universal nominal acceptance, not (as in the past) the divine right of kings or the omnipotent state, not the inferiority of races or women, not even socialism. Even if it be hypocrisy, it is significant—since hypocrisy, we know, is the homage that vice pays to virtue—that human rights is today the single, paramount virtue to which vice pays homage, that governments today do not feel free to preach what they may persist in practicing.

Id. at ix-x.

145. Id. at x.

146. Id.

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rights texts what they will. Instead, he turns to the Universal Declaration of Human Rights, which he sees as the bedrock, the constitution, of human rights.[147] Although Henkin insists that human rights are universal, he does not offer any non-Western political or moral underpinnings for them. Rather, he emphasizes that human rights are derived from "natural rights theories and systems, harking back through English, American, and French constitutionalism to John Locke."[148] The truth is that human rights instruments did not articulate the Western philosophical basis for the corpus because of the need to present the image of universality; it was not, as Henkin suggests, because the framers were politicians and citizens as opposed to philosophers.[149]

Henkin draws many parallels between human rights and American or Western constitutionalism but concludes, surprisingly, that the human rights corpus does not require a particular political ideology. This conclusion, with which this Article disagrees, has been popular among the pioneers of the human rights movement for a number reasons, including their basic assertion that human rights are distinct from politics—defined here as a particular ideology—and can be achieved in different political traditions such as socialist, religious, or free market systems. A further examination of the views of Henkin and other constitutionalists indicates just the opposite: that taken as a whole, their philosophy of human rights leads to the construction of liberal democratic states.

Henkin outlines and uses the basic precepts of American constitutionalism to argue that they are not required by the human rights corpus. He identifies these as: "original individual autonomy translated into popular sovereignty;" a social contract requiring self-government "through accountable representatives; . . . limited

147. The UDHR, Henkin says, reflects a "general commitment to ideas . . . that have become part of our zeitgeist." Id. The framers of the international human rights texts, Henkin writes, did not seek to build an "umbrella large enough to encompass everyone, but rather to respond to a sensed common moral intuition and to identify a small core of common values." Id.

148. Id. at 6.

149. Id. Henkin writes that the human rights expressions "claim no philosophical foundation, nor do they reflect any clear philosophical assumptions; they articulate no particular moral principles or any single, comprehensive theory of the relation of the individual to society." Id. Henkin has suggested that the diversity of cultures and political traditions has caused the human rights movement to eschew inquiries into the philosophical origins and justifications for the human rights corpus, fearing that such inquiry would prove "disruptive and unhelpful." Steiner, Youth of Rights, supra note 141, at 919.

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government for limited purposes;" and basic individual rights.[150] He argues that in contrast, the human rights regime "reflect[s] no comprehensive political theory"[151] about how the individual should relate to the state and vice versa; that a state's failure to respect individual rights does not trigger the right of revolution, although the corpus gives a "nod to popular sovereignty;"[152] and that it requires the state to be more active because of the ideas of socialism and the welfare state.[153] Henkin concedes that human rights instruments point to particular principles, but quickly denies that such principles imply a particular political theory:

> Necessarily, however, the idea of rights reflected in the instruments, the particular rights recognized, and the consequent responsibilities for political societies, imply particular political ideas and moral principles. International human rights does not hint at any theory of social contract, but it is committed to popular sovereignty. "The will of the people shall be the basis of the authority of government" and is to "be expressed in periodic elections which shall be by universal and equal suffrage." It is not required that government based on the will of the people take any particular form.[154]

In addition to the UDHR, the ICCPR gives citizens the right to political participation through elections and the guarantee of the right to assemble, associate, and disseminate their ideas.[155] These and the rights to equality and a fair trial imply a society with the following structure: a regularly elected government, real competition for political office, and the separation and independence of powers among the branches of government. The protection of the

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150. Henkin, Age of Rights, supra note 138, at 6.

151. Id. Note, though, Henkin's acknowledgment that at the start the United States saw the human rights movement as an instrument to "improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states)." Id. at 74.

152. Id. at 6.

153. Id.

154. Id. at 7 (footnote omitted) (quoting UDHR, supra note 1, art. 21(3)). Henkin notes that Western-style presidential and parliamentary regimes as well as communist "democratic centralism" could presumably meet this standard, provided that the governed can control how they are governed and by what policies they are governed, and that they can replace their governors at frequent and regular intervals. Id.

155. On assembly, see ICCPR, supra note 8, arts. 21 and 22. The right to political participation is contained in article 25; the right to expression in article 19; the rights of free speech in article 18. Id.

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individual, his autonomy, and property are among the key goals of such a society. The human rights regime does not dictate the particular variant of liberal society or the color of democracy it envisions; but the rights it guarantees, the ones that Henkin champions as the cornerstone of the human rights regime, seem to require a Western liberal democracy.

Although Steiner seems to agree with Henkin—that association and participation rights do not impose a particular government or political ideology—he identifies liberal democratic systems such as parliamentary or presidential systems, unicameral or bicameral legislatures, proportional representation, or "first past the post" system, as permissible under human rights standards.[156] Steiner notes, however, that dictatorships, inherited leadership, and many forms of one-party states would likely violate associational rights.[157]

Henkin seeks to distinguish human rights from American constitutionalism on the bases for which government is instituted. He argues that while "American rights" originally required a government for limited purposes, human rights, born after socialism and the welfare state, "imply a government that is activist, intervening, [and] committed to economic-social planning" to meet the needs of the individual.[158] This distinction, which relies on the traditional bifurcation of the responsibilities of government—either as the hands-off, negative instrumentality or the regulating, positive interventionist—is more fictitious than real.[159] The social democratic strand of liberalism, which Jack Donnelly credits with the welfare state,[160] has deep roots in liberalism and has historically challenged the individualist formulations of American constitutionalism. As Henkin himself acknowledges, the United States is not a welfare state by constitutional compulsion; but it is a welfare state nevertheless.[161] The political struggles of working Americans and in particular historically excluded groups, such as African-Ameri-

156. Steiner, Youth of Rights, supra note 141, at 930.

157. Id. at 930-31. Steiner allows that some one-party states may meet "generous interpretations" of pluralist participation if they have "extensive intraparty democracy." Id. at 931. But the human rights corpus requires more than pluralist participation; it imposes the respect and recognition for diversity and difference, judicial independence, and a private sector, conditions which are unlikely to be met in societal typologies found in the one-party state. Id.

158. Henkin, Age of Rights, supra note 138, at 145.

159. For a discussion of this positive-negative distinction and the ends of government, see generally Donnelly, supra note 9.

160. Id. at 54-55.

161. Henkin, Age of Rights, supra note 138, at 153.

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cans and women, have transformed "original American rights" and explicitly imposed interventionist commitments on the American state to alleviate economic and social disparities. Thus the distance between "American rights" and human rights that Henkin creates is somewhat exaggerated.[162]

Henry Steiner, another constitutionalist whose writing has concentrated on the content of human rights norms and the structure of the human rights regime, is more inclined to the view that human rights norms are best accomplished, and in most cases only accomplished, within liberal democracy. There is no suggestion that a theocracy or a military regime could accomplish human rights. Although he does not state it explicitly, a number of his writings suggest this conclusion.[163] In his first major article on human rights, for example, Steiner chose to explore the question of political participation, a foundational norm in liberal democracies, from a human rights perspective.[164] The article, which was published in the inaugural issue of the *Harvard Human Rights Journal* (then called the *Harvard Human Rights Yearbook*), explores the different understandings of the right to political participation in various political contexts, from liberal democracies to communist states. Drawing primarily on the UDHR and the ICCPR, which Steiner terms the "two most significant" human rights instru-

162. For a discussion of the use of rights rhetoric to advance economic and social rights (including the right to health) in the United States and internationally, see generally Harvard Law School Human Rights Program & François-Xavier Bagnoud Center for Health and Human Rights, Economic and Social Rights and the Right to Health (1995).

163. See, e.g., Steiner & Alston, International Human Rights in Context, supra note 16. This substantial work presents the inquiry into human rights as the contradiction between authoritarian, oppressive, non-democratic, non-Western societies on the one hand, and Western liberal core values such as the rights of association, speech, due process, and the ideals of equal protection on the other. In the view of this author, the text is the most comprehensive and provocative human rights coursebook to date.

164. Steiner, Political Participation, supra note 35, at 77.

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ments,[165] the article sidesteps any discussion about the philosophical and historical origins or justifications for human rights.[166]

Steiner categorizes the rights enumerated in the ICCPR in five sets which slide on a spectrum of universal acceptability and normative clarity. These are: traditional "negative" rights "which lie at the heart of the liberal tradition's commitment to individual autonomy and choice;"[167] rights that assure procedural fairness when a state seeks restrictions on individual liberty;[168] rights that involve anti-discrimination norms;[169] so-called expressive rights, which include free speech, association, and assembly;[170] and finally, the right to political participation.[171] While there is at least formal, near-universal consensus on the normative content of the rights in the first category—the negative rights—there has been no such unanimity on the meaning of the last category, the right to political participation.[172] However, respect for the first four categories of rights is unlikely to materialize in any systemic manner unless the right to political participation is understood and exercised from a particular ideological perspective. Steiner argues that an abusive regime can terminate some of the rights without altering the existing patterns of economic and political power under that regime. However, the "termination" of, say, one-party or military rule and its replacement by a participatory electoral system most

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165. Id. at 79. Steiner calls the UDHR the "spiritual parent" of many human rights treaties; the ICCPR's importance hinges on its acceptance by most of the world's states in all regions and ideological blocs. These facts give the two instruments "universal scope." Id. Elsewhere, Steiner writes:

> To this day, it [the UDHR] retains its symbolism, rhetorical force and significance in the human rights movement. It is the parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the treaties, in some sense the constitution of the entire movement. It remains the single most invoked human rights instrument.

Steiner & Alston, International Human Rights In Context, supra note 16, at 120.

166. Continuing the theme of universality, Steiner notes, however, that the "rights may be understood to be rooted in natural law or positive enactment. They may be justified by liberal postulates or by the imperative of socialist construction." Steiner, Political Participation, supra note 35, at 80.

167. Id. at 81. These are physical integrity rights. Id.

168. Id. at 82. These rights involve an individual's fair treatment within the criminal justice system. Id.

169. Id. These rights protect individuals and groups against discrimination on the basis of race, gender, color, religion, and political opinion. "Such norms respond to liberal ideology's stress on individuals' civil and political equality and on the state's neutrality." Id. at 82-83.

170. Id. at 83.

171. Id. at 84.

172. Id.

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likely would be "fatal to those in power."[173] This is particularly the case since such participation involves the exercise of expressive and other rights.

Debates during the drafting sessions of the relevant provisions of the UDHR and the ICCPR revealed divisions among different states about the content of the right to political participation. Although there is almost a twenty-year gap between the UDHR and the ICCPR, with non-Western states achieving a numerical majority in the UN in the interim, it is significant to note that the political participation articles—21 of the UDHR[174] and 25 of the ICCPR[175]—are nearly identical. Divisions on the content of these provisions were strictly ideological. The West and its philosophical allies in Latin America sought language to guarantee competitive multi-party elections through the secret ballot while Soviet bloc countries wanted open-textured provisions that would meet their more closed electoral systems.[176] Article 25 is deliberately vague enough to accommodate differing views. Both the "elections" and "take part" clauses do not spell out a liberal pluralist theory, although that seems to have been their original intention.

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173. Id. at 85.

174. UDHR, supra note 1, art. 21, provides:

> 1. Everyone has the right to *take part* in the government of his country, directly or through freely chosen representatives.
>
> 2. Everyone has the right of equal access to public service in his country.
>
> 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

(Emphasis added).

175. ICCPR, supra note 8, art. 25 provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> *(a)* To *take part* in the conduct of public affairs, directly or through freely chosen representatives;
>
> *(b)* To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> *(c)* To have access, on general terms of equality, to public service in his country.

(Emphasis added).

176. During the drafting of the UDHR, for example, the Belgian delegate to the Third Committee argued that the "very essence of the democratic system was the electoral competition between different political parties," otherwise the "whole democratic character of free, equal, periodical and secret elections might be distorted." U.N. GAOR 3d Comm., 3d Sess., 133d mtg. at 464, U.N. Doc. A/C.3/SR.133 (1948). But the Soviet delegate countered that such language would be "absolutely irreconcilable with the social structure of certain Member States." Id. at 471.

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> The International Covenant does not, then, offer the explicit guidance for the interpretation of Article 25 that a reference to Western pluralist theory would have provided. Its provision for elections fails to resolve some basic issues. Countries of radically different political systems which included *some* form of electoral process ratified it, without considering themselves to be in instant violation of Article 25 and without expressing their willingness to conform to any one political tradition's prescription of basic political processes.[177]

Steiner realizes the complex character of the norm of political participation and even argues that different political systems could meet it as formulated in article 25. He nevertheless pushes for an understanding of it that comes closer to a liberal pluralist formulation.[178] Such an understanding would reject as inadequate hereditary, non-competitive, one-party, or ritualistic "yes-or-no" electoral systems where the citizenry votes to evaluate only a single candidate. Seen as part of the gamut of the other four categories of rights that Steiner identifies, an interpretation of article 25 brings it closer to liberal political democracy. Steiner seems to echo this view when he concludes that:

> Fresh understandings and different institutionalizations of the right in different cultural and political contexts may reveal what an increasing number of states believe to be a necessary minimum of political participation for all states. That minimum should never require less of a government than provision for meaningful exercise of choice by citizens in some form of electoral process permitting active debate on a broad if not unlimited range of issues. But it could require much more.[179]

Elsewhere, Steiner is more explicit about the association of human rights norms with liberalism and the political structures of liberal democracy. In an article on autonomy regimes for minorities, Steiner imagines the application of norms and ideals which are essential to liberalism.[180] He argues for a political regime that recognizes the rights of ethnic, racial, or religious minorities to cul-

177. Steiner, Political Participation, supra note 35, at 93.
178. See id.
179. Id. at 134.
180. See Steiner, Autonomy Regimes, supra note 141, at 1539.

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tural survival and freedom from violence and repression by the majority. He notes that repressive and authoritarian governments preclude an effective voice for minorities, as would majoritarian democracies where the political structures give the "minority no effective electoral power or political leverage."[181] He further notes that minorities can use the ICCPR to argue for the "kind of fair or equitable political participation that [ICCPR] article 25 should be interpreted to require."[182] He finds the basis for the protection of the rights of minorities in the human rights regime's insistence and promotion of difference and diversity:

> The Universal Declaration and the Civil-Political Rights Covenant accept and, indeed, encourage many forms of diversity. They insist on respect for difference . . . . The value placed on the survival (and creation) of diversity in cultural, religious, political, and other terms permeates human rights law, which evidences throughout its hostility to imposed uniformity.[183]

Steiner emphasizes that the norm of equal protection—"perhaps the preeminent human rights norm"[184]—plays a key role in the protection and encouragement of diversity. He cites the freedoms of association, assembly, and expression as the vital complement to the project of equal protection.[185] In my view, the following passage sums up Steiner's "philosophy" of human rights and reveals his biases, although in most of his writings he seems to studiously avoid identifying human rights law with any one ideological orientation. He states that

> the aspirations of the human rights movement reach beyond the goal of preventing disasters. The movement also has a "utopian" dimension that envisions a vibrant and broadly based political community. Such a vision underscores the potential of the human rights movement for conflict with regimes all over the world. *A society honoring the full range of contemporary human rights would be hospitable to many types of pluralism and skeptical about any one final truth, at least to the point of allowing and protecting difference. It would not stop at the*

181. Id. at 1546.
182. Id.
183. Id. at 1547-48.
184. Id. at 1548.
185. Id.

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> *protection of negative rights but would encourage citizens to exercise their right to political participation, one path toward enabling peoples to realize the right to self-determination. It would ensure room for dissent and alternative visions of social and political life by keeping open and protecting access to the roads toward change.*[186]

Steiner differs from the conceptualizers explored here in that he views the right to political participation as a work in progress while the others tend to see it as a completed norm. For him, political participation is a programmatic right. It is not enough to carry out periodic elections; the "take part" clause is fertile ground for the development of the norm.

Among the constitutionalists, few have had the rare combination of high-level practical and scholarly experience that has characterized the work of Philip Alston.[187] A leading advocate of a broader conception of human rights, one that treats economic, social, and cultural rights as an integral part of the corpus, Alston has stated with approval that "the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity."[188] Hence, Alston's efforts to promote the legitimacy of rights such as the right to development,[189] and other eco-

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186. Steiner, Youth of Rights, supra note 141, at 931 (emphasis added).

187. Alston, an Australian, has served as the chair of the pivotal Committee on Economic, Social and Cultural Rights, the body that has overseen the implementation of the ICESCR since 1991. Between 1978 and 1984, he was an official of the United Nations Centre for Human Rights in Geneva. He has taught at Harvard Law School and the Fletcher School of Law and Diplomacy at Tufts University, and has been professor of law and director of the Australian National University's Centre for International and Public Law. Currently, he is a professor of international law at the European Law Institute in Florence, Italy. He has undertaken numerous high level activities for the United Nations and its specialized agencies.

188. Philip Alston, Making Space for New Human Rights: The Case of the Right to Development, 1 Harv. Hum. Rts. Y.B. 3, 3 (1988) [hereinafter Alston, Right to Development].

189. Alston rejects the arguments of opponents of the right to development, that either development is "incompatible with the philosophy underlying the existing body of international rights law" or that it is "non-justiciable." Id. at 7. In response to the first contention, he argues that the United Nations' conception of human rights does not rest exclusively on natural rights theory; he finds incoherence within the UDHR itself, which lists some rights he considers outside the natural rights theory such as economic and social rights. Id. at 29-30. With respect to the second objection to a right to development, he argues that human rights law privileges notions of "implementation" and "supervision" as opposed to "justiciability" or "enforceability." Thus, the existence of "judicial remedies"

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nomic, social and cultural rights whose status as "rights" remains contested.

In a statement to the 1993 World Conference on Human Rights, Alston's Committee on Economic, Social and Cultural Rights lamented that the massive violations of economic and social rights would have provoked "horror and outrage" if they had occurred to civil and political rights.[190] The Committee noted that it was "inhumane, distorted and incompatible with international standards" to exclude the one-fifth of the global population which suffered from poverty, hunger, disease, illiteracy, and insecurity from human rights concerns.[191] It noted that although "political freedom, free markets and pluralism" had been chosen by a large percentage of the global population in recent years because they were seen as the best routes for attaining economic, social and cultural rights, democracy will inevitably fail and societies will revert to authoritarianism unless those rights are respected.[192] The Statement, which underlines Alston's central goal, seeks the globalization of more humane economic and social structures—a social democracy—to complement the open political society of liberal democracy.

Thomas Franck is the first prominent constitutionalist to argue that democratic governance[193] has evolved from moral prescription to an international legal obligation.[194] Franck sees three recent occurrences as the unmistakable signs of the emergent right to governance: first, the failure of the August 1991 coup in the Soviet Union; second, the unanimous October 1991 resolution by the UN General Assembly to restore to power Jean-Bertrand Aristide, the then-ousted Haitian president; and third, the proliferation of states

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may not be required depending on the nature of the rights and the terms of the instrument in question. Id. at 35-36.

190. See Statement to the World Conference on Human Rights on Behalf of the Committee on Economic, Social and Cultural Rights, supra note 2, at 83.

191. Id.

192. Id.

193. Franck uses the term to describe a legal and practical commitment to "open, multiparty, secret-ballot elections with a universal franchise." Franck, The Emerging Right, supra note 12, at 47. I use only this one article by Franck because among all his numerous writings, it best expresses the views relevant to my argument.

194. Id. Franck traces the notion of "democratic entitlement" to the U.S. Declaration of Independence, with its assertion that governments are instituted to secure the "'unalienable rights' of their citizens . . . [and] derive their just powers from the consent of the governed." Id. at 46. He also traces the international legitimacy of governments to their demonstration of "a decent respect to the opinions of mankind," hence, through their recognition and legitimization by other nations. Id.

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committed to competitive elections.[195] In celebratory fashion, Franck highlights the rejection of the "dictatorship of the proletariat,"[196] "people's democracy,"[197] and the dictatorships of Africa and Asia by "people almost everywhere"[198] who "now demand that government be validated by western-style parliamentary, multiparty democratic process."[199] He emphasizes that "[o]nly a few, usually military or theocratic, regimes still resist the trend."[200] With great optimism he concludes that:

> This almost-complete triumph of the democratic notions of Hume, Locke, Jefferson and Madison—in Latin America, Africa, Eastern Europe and, to a lesser extent, Asia—may well prove to be the most profound event of the twentieth century and, in all likelihood, the fulcrum on which the future development of global society will turn. It is the unanswerable response to those who have said that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of western industrial states.[201]

After exploring the involvement of regional and international organizations and governments in activities that enhance the right to democratic governance—such as sanctions systems and election monitoring—Franck lists the human rights instruments that constitute "the large normative canon"[202] which promotes democratic entitlement. These instruments recognize individual rights and

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195. Id. at 46-47.

196. Id. at 48.

197. Id. at 47.

198. Id. at 49.

199. Id.

200. Id. He adds that "[v]ery few argue that parliamentary democracy is a western illusion and a neocolonialist trap for unwary Third World peoples." Id.

201. Id.

202. Id. at 79. This includes the U.N. Charter; UDHR, supra note 1; ICCPR, supra note 8; the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1981), reprinted in 21 I.L.M. 205 (1982); the Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979), reprinted in 19 I.L.M. 33 (1980) (entered into force Sept. 3, 1981) [hereinafter CEDAW]; the International Covenant on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973), reprinted in 13 I.L.M. 56 (1974) (entered into force July 18, 1976); and the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966) (entered into force Jan. 4, 1969) [hereinafter CERD].

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require equal protection. Franck here deploys human rights law to underpin the right to democratic governance.

While the majority of constitutionalists are reluctant to make explicit connections between the human rights corpus and political democracy, they generally use typically Western conceptions of rights to explain the content and implications of human rights law. Although many make references to the influence of the different types of socialism on the fashion of human rights, such references are spotty and carry minor significance in these analyses. In virtually no instances do constitutionalists explore in an inclusive manner non-Western ideals and notions of rights or duties. There is no paucity of references, however, to non-Western ideas, practices, and political and social structures that contradict human rights norms.

IV. THE DILEMMAS OF THE AGNOSTIC

One of the most probing critiques of the human rights corpus has come from non-Western thinkers who, though educated in the West or in Western-oriented educational systems, have philosophical, moral, and cultural questions about the distinctly Eurocentric formulation of human rights discourse. They have difficulties accepting the specific cultural and historical experiences of the West as the standard for all humanity. As outsider-insiders,[203] cultural agnostics understand and accept certain contributions of Western (largely European) civilization to the human rights movement but reject the wholesale adoption or imposition of Western ideas and concepts of human rights. Instead, they present external critiques to human rights discourse, while generally applying language internal to that discourse. By agnostics, I do not refer to external critiquers who think that as a Western project the human rights system is irredeemable and cannot rearrange its priorities or be transformed by other cultural milieus to reflect a genuinely uni-

203. I use the term "outsider-insiders" to bunch together Africans, Asians, Latin Americans, non-mainstream Western scholars, and certain members of racial and cultural minorities in the West, such as African-Americans and Asian-Americans. The latter have historically been part of the struggle to vindicate non-European cultural viewpoints in the West. In feminist jurisprudence, for example, Black scholars have advocated the recognition of views other than those of mainline White feminists. See, e.g., Hope Lewis, Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide, 8 Harv. Hum. Rts. J. 1 (1995) (distinguishing black feminist human rights approaches from mainstream perspectives and calling for a cross-cultural discussion to improve the quality of debate).

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versal character and consensus.[204] Rather, I mean those who advocate a multicultural approach in the reconstruction of the entire edifice of human rights. They could also be termed human rights pluralists.

There is no dispute about the European origins of the philosophy of the human rights movement; even Westerners who advocate its universality accept this basic fact. Refuge from this disturbing reality is taken in the large number of states, from all cultural blocs, which have indicated their acceptance of the regime by becoming parties to the principal human rights instruments.[205] Others argue that as more non-Western states have become significant members of the international community, their influence on international lawmaking has corrected the initial lopsidedness of the enterprise and allowed other historical heritages to exert themselves.

This positivistic approach has some value, but it does not answer the agnostic challenge or endow the human rights corpus with multicultural universality. There are fundamental defects in presenting the state as the reservoir of cultural heritage. Many states have been alien to their populations and it is questionable whether they represent those populations or whether they are little more than internationally recognized cartels organized for the sake of keeping power and access to resources.[206] It is difficult to identify the motivations, for example, that led the abusive Zairian state of Mobutu Sese Seko to ratify the major human rights instruments;[207] respect for international standards could not have been high among them. Many states seem to ratify human rights instruments to blunt criticism, and because as a general rule the cost to their sovereignty is nominal.

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204. For a view that advocates the incompatibility of human rights norms with non-Western needs and views, see Pannikar, supra note 3.

205. As of July 1994, 127 states had ratified, acceded or succeeded to the ICCPR, arguably the principle human rights treaty. See Report of the Human Rights Committee, U.N. GAOR, 49th Sess., Supp. No. 40, at 1, U.N. Doc. A/49/40 (1994).

206. I have argued elsewhere that the state in Africa was organized for the purposes of colonial exploitation, it was decolonized as a tool of the international state system and the Cold War, and it has survived without internal legitimacy or coherence because of external support. See Makau wa Mutua, Why Redraw the Map of Africa: A Moral and Legal Inquiry, 16 Mich. J. Int'l L. 1113 (1995); Makau wa Mutua, Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State, 21 Brook. J. Int'l L. 505 (1995) (book review).

207. See Makau wa Mutua & Peter Rosenblum, Zaire: Repression As Policy (Lawyers Committee for Human Rights, 1990) (documenting the abuses of the Zairian state against its own citizens).

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Agnostics look beyond the positive law and explore the historical and cultural imperatives that are essential for the creation of a legitimate corpus. Some point, for instance, to the celebration of the individual egoist in human rights law as a demonstration of its limited application. As this author has noted elsewhere:

> The argument by current reformers that Africa merely needs a liberal democratic, rule-of-law state to be freed from despotism is mistaken. The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa. The sacralization of the individual and the supremacy of the jurisprudence of individual rights in organized political and social society is not a natural, "transhistorical," or universal phenomenon, applicable to all societies, without regard to time and place.[208]

Some African scholars have been particularly uncomfortable with this emphasis, resisting the unremitting emphasis on the individual. Okere notes, for instance, that "[t]he African conception of man is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity."[209] Individuals are not atomistic units "locked in a constant struggle against society for the redemption of their rights."[210] The concept of the group-centered individual in Africa delicately entwines rights and duties, and harmonizes the individual with the society. Such a conception does not necessarily see society—organized either as the community or the state—as the individual's primary antagonist.[211] Nor does it permit the over-indulgence of the indi-

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208. Mutua, African Cultural Fingerprint, supra note 3, at 341. This author further noted that, "[t]he ascendancy of the language of individual rights has a specific historical context in the Western world. The rise of the modern state in Europe and its monopoly of violence and instruments of coercion gave birth to a culture of rights to counterbalance the invasive and abusive state." Id. at 341-42.

209. B. Obinna Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems, 6 Hum. Rts. Q. 141, 148 (1984). John Mbiti has argued that in Africa the individual's rights, needs, sorrows, and duties are woven in a tapestry that denies runaway individualism. "I am because we are; and since we are, therefore I am." John Mbiti, African Religions and Philosophy 141 (1990).

210. Richard N. Kiwanuka, The Meaning of "People" in the African Charter on Human and Peoples' Rights, 82 Am. J. Int'l L. 80, 82 (1988).

211. See Mutua, African Cultural Fingerprint, supra note 3, at 363.

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vidual at the expense of the society.[212] This conception resists casting the individual as the center of the moral universe; instead, both the community and the individual occupy an equally hallowed plane.

In the context of Asia, a number of writers have also cast doubt on the individualist conception of rights and its emphasis on negative rights.[213] Although many of these commentators are connected to governments in the region, and therefore have an interest in defending certain policy and development approaches, it would be sloppy to dismiss them out of hand. Such dismissals, which the INGO community issues with haste and without much thought about the cultural character of the human rights corpus, have aggravated differences between the West and certain Asian countries over the interpretation of human rights.[214] The University of Hong Kong's Professor Ghai powerfully critiques the cynical distortion of Asian conceptions of community, culture and religion, as well as the use of state apparatuses to crush dissent. He argues that the political elites manipulate cultural imagery to further eco-

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212. Dunstan Wai argues that African conceptions of human rights guaranteed a "modicum of social justice and values concerned with individual and collective rights." Dunstan Wai, Human Rights in Sub-Saharan Africa, in Human Rights: Cultural and Ideological Perspectives 115, 116 (Adamantia Pollis & Peter Schwab eds., 1979).

Asmarom Legesse notes the importance of this balance between the individual and the society so that "individuals do not deviate so far from the norm that they can overwhelm the society." Asmarom Legesse, Human Rights in African Political Culture, in The Moral Imperatives of Human Rights: A World Survey 123, 125 (Kenneth W. Thompson ed., 1980).

213. A vocal advocate of the Asian conception of human rights has argued, for instance, that

> many East and Southeast Asians tend to look askance at the starkly individualistic ethos of the West in which authority tends to be seen as oppressive and rights are an individual's "trump" over the state. Most people of the region prefer a situation in which distinctions between the individual, society, and state are less clear-cut, or at least less adversarial. It will be far more difficult to deepen and expand the international consensus on human rights if East and Southeast Asian countries believe that the Western promotion of human rights is aimed at what they regard as the foundation of their economic success.

Kausikan, supra note 3, at 36.

Kausikan has served as the director of the East Asian and Pacific bureau of the Ministry of Foreign Affairs of Singapore. Id at 24. For an elaboration of Kausikan's views on the universality of human rights, see Bilahari Kausikan, An Asian Approach to Human Rights, 89 Am. Soc'y Int'l L. Proc. 146 (1995); Bilahari Kausikan, An East Asian Approach to Human Rights, 2 Buff. J. Int'l L. 263 (1996). For a forceful repudiation of Kausikan, see Aryeh Neier, Asia's Unacceptable Standard, 92 Foreign Pol'y 42 (1993).

214. Human Rights Watch in particular has been very vocal in its rejection of the so-called Asian concept of human rights, which emphasizes economic development over respect for civil and political rights. See World Report 1995, supra note 22, at xiv.

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nomic development and retain power.[215] That critique does not elaborate, however, on the cultural and philosophical differences between different Asian traditions and Western ones and on how those differences might manifest themselves in the construction of human rights norms.

Cultural agnostics do not reject the Western conception of human rights in toto; nor do they even deny that a universal corpus may ultimately yield societal typologies and structures similar to those imagined by the present human rights regime. At stake for them is the availability of the opportunity for all major cultural blocs of the world to negotiate the normative content of human rights law and the purposes for which the discourse should be legitimately deployed. Many African agnostics and some Africanists, for example, have demonstrated the similarity of human rights norms in Western states to pre-colonial African states and societies. These included due (fair) process protections;[216] the right to political participation;[217] and the rights to welfare, limited government, free speech, conscience, and association.[218] These rights, however, were not enjoyed as an end in themselves or with the sole

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215. See Ghai, supra note 22, at 20. Ghai attacks the notion of a unique or singular Asian perspective on human rights because of the religious, political, and economic diversities prevalent in the region. Id. at 5. See also Susan Sim, Human Rights: The East Asian Challenge, The Straits Times (Singapore), Feb. 18, 1996, at SR1, SR4, available in LEXIS, News Library, CURNWS File.

216. Kwasi Wiredu, for example, contends that the principle of innocent until proven guilty was an essential part of Akan (West African peoples') consciousness. "[I]t was an absolute principle of Akan justice that no human being could be punished without a trial." Kwasi Wiredu, An Akan Perspective on Human Rights, in Cross-Cultural Perspectives, supra note 9, at 243, 252. Timothy Fernyhough notes that Africa's preoccupation with the right to life was manifested in the power to hand down the death penalty, which was reserved for a few elders "only after elaborate judicial procedure, with appeals from one court to another, and often only in cases of murder or manslaughter." Timothy Fernyhough, Human Rights and Precolonial Africa, in Human Rights and Governance in Africa 39, 56 (Ronald Cohen, et al. eds., 1993). He notes, further, that "in the Tio kingdom north of modern Brazzaville, . . . as elsewhere in Africa, a strong tradition of jurisprudence existed, with specific rulings for penalties cited as precedents, such as levels of fines for adultery." Id. at 62.

217. See Wiredu, supra note 216, at 248-49.

218. For example, Wiredu writes:

> Akan thought recognized the right of a newborn to be nursed and educated, the right of an adult to a plot of land from the ancestral holdings, the right of any well-defined unit of political organization to self-government, the right of all to have a say in the enstoolment or destoolment of their chiefs or their elders and to participate in the shaping of governmental policies, the right of all to freedom of thought and expression in all matters, political, religious, and metaphysical, the right of everybody to trial before punishment, the right of a person to remain at any locality or to leave, and so on.

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intent of fulfilling just the individual. Among the major human rights instruments, only the African Charter on Human and Peoples' Rights attempts the comprehensive unification of these conflicting notions of community, individual rights, and duties to the family, the community, and the state.[219]

Agnostics agree that many of the human rights in the current corpus are valid as human rights, their Western origin notwithstanding. The difficulty lies in the emphasis placed on certain rights, their ranking within that universe, and ultimately the political character of the state required or implied by that conception of rights. Although African agnostics, for example, bitterly oppose the violations of civil and political rights by the post-colonial state, they see little redemption in a campaign or worldview that seeks merely to transplant Western notions of political democracy and "negative" rights to African states. The contrived nature of the African state and its inability to claim the loyalties of its citizenry have been compounded by the delegitimization of cultural and philosophical identities by European values and practices. Africa appears to have lost its pre-colonial moral compass and fallen prey to the machinations of bands of elites who exist in cultural suspension, neither African nor foreign.

Some agnostics call for reconnection with certain human rights ideals from Africa's pre-colonial past to address social problems and to attempt to arrest political disintegration. The reconstruction of the ancient duty-rights dialectic, which was essential to the vitality of Africa's social and political fabric, has been advanced as a critical starting point in the redefinition of the relationship between individual and community, and individual and state. As this author has stated elsewhere:

> The duty/rights conception of the African Charter could provide a new basis for individual identification with compatriots, the community, and the state. It could forge and instill a national consciousness and act as the glue to reunite individuals and different nations within the modern state, and at the same time set the proper limits

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Id. at 257. See also Mutua, African Cultural Fingerprint, supra note 3, at 346-47 (discussing human rights in various pre-colonial African cultures).

219. African Charter, supra note 6. The African Charter codifies all three "generations" of rights: civil and political rights; economic, social and cultural rights; and peoples' rights, such as the right to development, self-determination or political sovereignty over natural resources. Id.

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> of conduct by state officials. The motivation and purpose behind the concept of duty in pre-colonial societies was to strengthen community ties and social cohesiveness, creating a shared fate and common destiny. This is the consciousness that the impersonal modern state has been unable to foster. It has failed to shift loyalties from the lineage and the community to the modern state, with its mixture of different nations.[220]

The human rights corpus' over-emphasis on the individual runs counter to this African worldview; it would most likely delay or arrest Africa's reconstruction if applied without the restraint of balance, the tempering of the ego with the fuller understanding of rights that sees them in all their political, economic, and social dimensions. Agnostics feel that while ultimately the state that emerges from this conception may resemble a Western-style democracy in certain respects, such an outcome need not be predetermined or required by the human rights corpus. Asian agnostics accept that changes in the political character of the state are inevitable as their societies become more prosperous economically, but they are reluctant to conclude that this evolutionary process will automatically lead to a Western-type democracy.[221]

The dilemma of the agnostic, therefore, is not that he sees an "evil" in the Eurocentric formulation of the human rights corpus; although he sees much good in it, he does not agree with its zealous Western construction and its close identification with liberal democracy. Ultimately, of course, the major bone of contention is the cultural legitimacy of the corpus in non-Western settings.

V. POLITICAL STRATEGISTS: INSTRUMENTALISM IN HUMAN RIGHTS

The school of political strategists, of all the four typologies explored here, is the least principled and the most open-textured in the manner and the purposes for which it deploys human rights

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220. Mutua, African Cultural Fingerprint, supra note 3, at 368 (footnote omitted).

221. Kausikan, supra note 3, at 38. Kausikan suggests that the collapse of communism, which many in the West saw as the triumph of its liberal democratic values and systems, has been used as a "lens through which [Western media, NGOs, and human rights activists] view developments in other regions." Id. at 33. Kausikan warns that an approach which gauges states by the progress of democracy is ideological because democracy is "a value-laden term, itself susceptible to multiple interpretations, but usually understood by Western human rights activists and the media as the establishment of political institutions and practices akin to those existing in the United States and Europe." Id.

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discourse. Apart from the United Nations, whose Center for Human Rights is responsible for human rights matters, Western governments, and particularly the United States, have been the principal advocates for the use of human rights as a tool of policy against other states. In this respect, human rights standards have been viewed as norms with which non-Western, non-democratic states must comply. The United States, from the birth of the movement half a century ago, viewed human rights "as designed to improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states)."[222] Henkin believes that because individual rights "dominate [America's] constitutional jurisprudence, and are the pride of its people, their banner to the world,"[223] such a view is natural. Western European industrial democracies hold similar viewpoints, as evidenced by their trade and aid policies towards each other, as well as towards non-Western states.[224] Western international financial institutions such as the World Bank and the IMF have followed the lead of these major powers and have started to link some of their activities to human rights concerns.[225]

The United States was a principal player in the drafting of the major international human rights instruments, although it has been reluctant to become a party to most of them.[226] It was not until the 1970s that the United States started institutionalizing human rights

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222. Henkin, Age of Rights, supra note 138, at 74. This view, according to Henkin, results from the fact that the United States is "a principal ancestor of the contemporary idea of rights." Id. at 65.

223. Id.

224. For an eloquent exploration of Western European (European Union, formerly European Community) policies linking human rights and democracy to aid and trade in their relationship with non-Western countries, see Demetrios James Marantis, Human Rights, Democracy, and Development: The European Community Model, 7 Harv. Hum. Rts. J. 1 (1994).

225. See F.L. Osunsade, IMF Support for African Adjustment Programs: Questions and Answers 8 (IMF, 1993); cf. Balakrishnan Rajagopal, Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights, 11 B.U. Int'l L.J. 81, 100 (1993) (noting that the charter of the IMF allows linkage between human rights and IMF activities).

226. The United States has only recently ratified two important human rights instruments: the Convention on the Prevention and Punishment of Genocide of December 9, 1948, ratified by the United States in 1988; and the ICCPR, ratified by the United States in 1992. Among others, the United States has still not ratified the ICESCR, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention for the Elimination of All Forms of Discrimination Against Women, and the American Convention on Human Rights. See Henkin, Age of Rights, supra note 138, at 74-75; see also Lawyers Committee, ICESCR Ratification, supra note 103.

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within its foreign policy bureaucracy.[227] Policy upheavals triggered by the conflict in Vietnam, American support for repressive regimes in Latin America, and the crises of the Nixon presidency precipitated a more systematic evaluation of human rights concerns in American foreign policy.[228] As a result, laws were amended to restrict assistance to countries with particular levels of human rights abuses.[229] In 1977, President Jimmy Carter elevated the head of the Human Rights Bureau[230] within the Department of State to the rank of Assistant Secretary of State for Human Rights and Humanitarian Affairs.[231] Perhaps Carter's lasting achievement will be the rhetorical prominence that his administration gave human rights in American foreign policy.

The Carter legacy has not resulted in continued support for consistency in the application of human rights to foreign policy. There have always been glaring gaps between declared U.S. policy and actual practice toward foreign countries. Under Carter, inconsistent attempts were made to link support for particular countries to their human rights records, a task made all the more difficult by the logic of the cold war. As a general rule, pro-Western but despotic states such as the Shah's Iran, Zaire, South Korea, and Indonesia continued to receive U.S. military assistance.[232] This fact was understated by the Carter administration official responsible for human rights in the National Security Council in 1979-80:

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227. See American Association for the International Commission of Jurists, Human Rights and US Foreign Policy: The First Decade 1973-1983, at 6 (1984) [hereinafter US Foreign Policy].

228. Id. at 9. As a result of these upheavals, in 1973 the U.S. Congress launched hearings to determine the type and level of recognition that human rights should receive in foreign policy considerations. Id. See also Makau wa Mutua, The African Human Rights System in a Comparative Perspective, 3 Rev. of Afr. Comm'n Hum. & Peoples' Rts. 5, 6 (1993).

229. See Foreign Assistance Act, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1974) (creating § 502B) (codified at 22 U.S.C. § 2304 (1994)); International Development and Food Assistance Act, Pub. L. No. 94-161, title III, § 310, 89 Stat. 849, 860 (1975) (creating Foreign Assistance Act § 116) (codified at 22 U.S.C. § 2151n (1994)). The amendments made human rights a "principal goal" of U.S. foreign policy.

230. Congress mandated the establishment of this office and instructed it to report annually on the human rights conditions in every country in the world. International Security Assistance and Arms Export Control Act, Pub. L. No. 94-329, § 301(b), 90 Stat. 729, 750 (1976) (amending Foreign Assistance Act of 1961 § 624(f)) (codified as amended at 22 U.S.C. §§ 2151n, 2304, 2384) (1994).

231. US Foreign Policy, supra note 227, at 17.

232. Id. at 21 (quoting Secretary of State Cyrus Vance: "'In each case,' the Secretary explained, 'we must balance a political concern for human rights against economic and security goals.'").

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> When it came to specifics, whether the aid was military or nonmilitary, complex interests had to be balanced in reaching decisions on individual cases. Inescapably, there were numerous cases in which the administration was exposed to the charge of inconsistency. Human rights performance became a dominant factor in conventional arms transfers to Latin America; but such considerations were clearly subordinate in weighing military aid to Egypt, Israel, North Yemen and Saudi Arabia.[233]

While Carter was inconsistent and continued American support for abusive client states, the Reagan administration found the "perfect" use for human rights in American foreign policy. Rather than push for the unlikely repeal of human rights concerns from American policy, which many human rights advocates feared, the administration quickly enlisted human rights as a key ally in the greater struggle against Communism, which many officials saw as the prime evil of the day. Thus, as Henkin noted:

> For the Reagan administration, the struggle between good and evil was itself a struggle for the values commonly associated with human rights. The overriding concern for the United States was to resist, contain, and defeat Communist expansion. That was not only seen as in the United States [sic] interest generally, but it furthered human rights since Communism was the epitome of disrespect for human rights, and where Communism was, or came, human rights were lost irretrievably. Opposition to Communism, including criticism of any new and particular human rights violations by Communist states (as when military rule came to Poland, or Sakharov was confined and mistreated), should be strong and loud and clear.[234]

This reasoning eventually led the administration to solidify its human rights policy around the promotion of democracy. This policy was outlined as the promotion of "democratic processes in order to help build a world environment more favorable to respect

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233. Id. (quoting Lincoln P. Bloomfield, From Ideology to Program to Policy: Tracking the Carter Human Rights Policy, 2 J. Pol'y Analysis Mgmt. 1, 8 (1982)).

234. Henkin, Age of Rights, supra note 138, at 71.

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for human rights."[235] It was billed as a dual policy that opposed human rights violations while strengthening democracy. The policy aimed singularly at the promotion of democracy "as *the* human right, rejecting in principle not only military 'juntas' but the many one-party states of Africa and Asia."[236] In reality, of course, the administration coddled right-wing dictatorships and oppressive pro-Western regimes, including apartheid South Africa.[237] With the end of the Cold War, however, political conditionality has frequently been used to push one-party states towards the creation of more open, democratic political structures.[238]

The Bush administration did not dramatically depart from the substance of the Reagan policy, although it countenanced the withdrawal of knee-jerk U.S. support for some pro-Western regimes primarily because of the collapse of Communism.[239] Despite its rhetorical defense of human rights, the Clinton administration has been more concerned with the promotion of democratic initiatives and trade opportunities than with the principled application of human rights norms.[240] The United States has frequently used human rights as a weapon of its foreign policy, but that use has rarely been principled. The invocation of human rights has variously been used to justify access to markets or resources vital to the United States, as was the case with the U.S.-led military defeat of Iraq in 1991. The support and the promotion of popularly elected regimes has, however, been privileged by the Clinton administration as the more effective method for advancing what it

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235. Department of State, Country Reports for Human Rights Practices for 1985, at 3 (1986) (Report submitted to House Comm. on Foreign Affairs and Senate Comm. on Foreign Relations, 99th Cong., 2d Sess.).

236. Henkin, Age of Rights, supra note 138, at 72.

237. See, e.g., Mutua & Rosenblum, supra note 207. For a more comprehensive review of the repressive regimes supported by the Reagan administration, see The Watch Committees & Lawyers Committee for Human Rights, The Reagan Administration's Record on Human Rights in 1986 (1987).

238. See Meeting of the Consultative Group for Kenya, supra note 24; see also Jane Perlez, On Eve of Talks with Aid Donors, Kenya is under Pressure to Democratize, New York Times, Nov. 25, 1991, at A9. In May 1992, the World Bank-led groups of Malawi donors also suspended aid pending moves towards political pluralism by the Banda regime. See Lawyers Committee for Human Rights, Malawi: Ignoring Calls for Change 10 (1992).

239. See generally Human Rights Watch, Human Rights Watch World Report 1992: Events of 1991, at 1-2 (1991) (lamenting the Bush administration's "downgrading the significance of human rights in the formulation of US foreign policy").

240. In October 1994, for example, the Clinton administration forced the restoration to power of the democratically elected Haitian government of President Aristide. See World Report 1995, supra note 22, at 99. But in May of the same year, it also ended the linkage of China's Most Favored Nation status to human rights conditions. Id. at 146-47.

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sees as the three inseparable goals of democracy, human rights, and, most important, free markets.[241]

International financial institutions and donor agencies also constitute an increasingly important component of the political strategy approach. World Bank-led groups of donors that keep many states in the South from total economic collapse have used human rights conditionalities to force economic liberalization, a measure of public accountability, and political pluralism. But the World Bank's concern with "good governance" has not been altruistic. That attitudinal change came after the Bank's utter failure to reverse economic decline in Africa. Overlooking its own role in exacerbating Africa's underdevelopment, the Bank concluded in 1989 that "underlying the litany of Africa's development problems is a crisis of governance."[242] In what amounted to a prescription for liberal democracy, it defined governance in the following familiar language:

> By governance is meant the exercise of political power to manage a nation's affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account. . . . The leadership assumes broad discretionary authority and loses its legitimacy. Information is controlled, and many voluntary organizations are co-opted or disbanded. This environment cannot readily support a dynamic economy. At worst the state becomes coercive and arbitrary. These trends, however, can be resisted. . . . It requires a systematic effort to build a pluralistic institutional structure, a determination to respect the rule of law, and vigorous protection of the freedom of the press and human rights.[243]

The Bank has used its forbidding political and economic muscle to stare a few states down and push for political reform. Through its consultative groups (CGs)—the collection of donors—it pressed for political change in Kenya and Malawi in the early 1990s,

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241. As a demonstration of the view that human rights, democracy, and free markets are intrinsically linked, the Assistant Secretary of State for Human Rights and Humanitarian Affairs has been renamed the "Assistant Secretary of State for Democracy, Human Rights, and Labor." See 22 U.S.C. § 2151n(c) (1994).

242. World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth, a Long-Term Prospective Study 60 (1989).

243. Id. at 60-61.

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although it did not heed its own message in continuing support for China, Zaire, Morocco, and Indonesia, to name just a few undemocratic states with serious human rights problems.[244] INGOs have seized this opening to seek a more systematic application of human rights norms by multilateral donors.[245] The significance of the Bank's general attitude lies in its conclusions: economic liberalization and free markets are less likely in undemocratic regimes that abuse basic liberal freedoms.[246] Authoritarian but economically prosperous Asian states, such as Singapore, China (PRC), Indonesia, and South Korea, have attacked the linkage of human rights to aid and trade as an abuse of human rights and a new form of imperialism by the West.[247] The trademark of political strategists is their unabashed deployment of human rights and democracy interchangeably for the advancement of a variety of interests: strategic, tactical, geopolitical, security, "vital," economic, and political. None of the preceding three schools of thought equals their cynicism.

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244. See Governance and Human Rights, supra note 24, at 37-42.

245. Id. The report of the Lawyers Committee for Human Rights is a prime example of the enlistment of donors by INGOs in the human rights crusade. INGOs now work with donors to exploit this willingness to include human rights concerns in their relations with recipient countries.

246. The Bank's 1991 World Development Report read, in part:

> Few authoritarian regimes, in fact, have been economically enlightened. Some of the East Asian [newly industrialized economies] are the exceptions, not the rule. Dictatorships have proven disastrous for development in many countries—in Eastern Europe, Argentina, Central African Republic, Haiti, Myanmar, Nicaragua, Peru, Uganda, and Zaire, to name only a few. Democracies, conversely, could make reform more feasible in several ways. Political checks and balances, a free press, and open debate on the costs and benefits of government policy could give a wider public a stake in reform.

World Bank, The Challenge for Development, in World Development Report 1991, at 133 (1991), cited in Governance and Human Rights, supra note 24, at 41-42.

247. See Report of the Regional Meeting for Asia of the World Conference on Human Rights, UN Doc. A/CONF.157/ASRM/8-A/CONF.157//PC/59 (1993) [hereinafter Bangkok Declaration]; Kausikan, supra note 3, at 33-34; Ali Alatas, Minister for Foreign Affairs and Head of the Delegation of the Republic of Indonesia, Statement before the Second World Conference on Human Rights at Vienna, 9 U.N. Doc. A/48/214 (June 14, 1993). See also Information Office of the State Council of the People's Republic of China, Human Rights in China, Nov. 1, 1991, available in LEXIS, News Library, ARCNWS File. For more on China's positions on human rights, see Information Office of the State Council of the People's Republic of China, The Progress of Human Rights in China (1996), Jan. 31, 1996, available in LEXIS, News Library, CURNWS File.

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VI. CONCLUSIONS

This Article has attempted to make a more explicit link between human rights norms and the fundamental characteristics of liberal democracy as practiced in the West, and to question the mythical elevation of the human rights corpus beyond politics and political ideology. In the past, the main authors of the human rights discourse have been reluctant to make this connection either, as I suspect, because they sincerely did not believe that an honest inquiry could pin the human rights movement down to a specific political structure, or because it would have been an admission against interest in the context of the Cold War, amidst states only too eager to exploit cultural and political excuses to justify or continue repressive policies and practices. Now that the end of the Cold War has lifted at least part of that injunction, it seems imperative that probing inquiries about the philosophical and political raison d'etre of the human rights regime be encouraged and welcomed.

While I do not think that the human rights movement is a Western conspiracy to deepen its cultural stranglehold over the globe, I do believe that its abstraction and apoliticization obscure the political character of the norms that it seeks to universalize. As I see it, that universe is at its core and in many of its details, liberal and European. The continued reluctance to identify liberal democracy with human rights delays the reformation, reconstruction, and the multiculturization of human rights. Defining those who seek to reopen or continue the debate about the cultural nature and the raw political purposes of the human rights regime as "outsiders" or even as "enemies" of the movement is the greatest obstacle to the movement to bring about true universalization.

A half century after the Universal Declaration of Human Rights laid the foundation for the human rights movement, those ideas have been embraced by diverse peoples across the earth. That fact is undeniable. But it is only part of the story. Those same people who have embraced that corpus also seek to contribute to it, at times by radically reformulating it, at others by tinkering at the margins. The human rights movement must not be closed to the idea of change or believe that it is the "final" answer. It is not. This belief, which is religious in the evangelical sense, invites "end of history"-type conclusions and leaves humanity stuck at the doors of liberalism, unable to go forward or imagine a post-liberal society. It is an assertion of a final truth. It must be rejected.

From the perspective of this Article, the human rights corpus—as a philosophy that seeks the diffusion of liberalism and its pri-

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macy around the globe—can ironically be seen as favorable to political and cultural homogenization and hostile to difference and diversity, the two variables that are at the heart of the vitality of the world today. Yet, strangely, many human rights instruments explicitly encourage diversity through the norm of equal protection, which Steiner sees as the cardinal human rights norm.[248] As he correctly notes:

> Other rights declared in basic human rights instruments complement the ideal of equal respect and confirm the value placed on diversity. Everyone has a right to adopt "a religion or belief of his choice" and has freedom "either individually or in community with others and in public or private" to manifest belief or religion in practice and teaching. Rights to "peaceful assembly" and "freedom of association with others," in each case qualified by typical grounds for limitation like public order or national security, further commit the human rights movement to the protection of people's ongoing capacity to form, develop, and preserve different types of groups.[249]

The paradox of the corpus is that it seeks to foster diversity and difference but does so only under the rubric of Western political democracy. In other words, it says that diversity is good so long as it is exercised within the liberal paradigm, a construct that for the purposes of the corpus is not negotiable. The doors of difference appear open while in reality they are shut. This inelasticity and cultural parochialism of the human rights corpus needs urgent revision so that the ideals of difference and diversity can realize their true meaning. Since we now live in the Age of Skepticism,[250] the long-term interests of the human rights movement are not likely to be served by the pious and righteous advocacy of human rights

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248. See Steiner, Autonomy Regimes, supra note 141, at 1548. For example, some human rights conventions are fully fashioned on the principle of equal protection. See, e.g., CEDAW and CERD, the gender and race conventions, respectively, supra note 202.

249. Steiner, Autonomy Regimes, supra note 141, at 1548 (footnotes omitted).

250. By the "Age of Skepticism" I mean the era of post-industrialism during which the technological revolution and the failure of political democracy to end injustice have dashed the popular expectation that the improvement of the lot of humanity will always be a constant. It is an age during which naiveté has given way to skepticism and paved the way for the realization that the organizational norms and structures that have evolved so far are merely experimental. The Age of Skepticism has the potential to free humanity from tradition and allow it to think more creatively and imaginatively about the future.

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norms as frozen and fixed principles whose content and cultural relevance is unquestionable.

Based on this premise, the human rights movement needs to alter its orientation, which has been an orientation of moral, political, and legal certitude. There needs to be a realization that the movement is young and that its youth gives it an experimental status, not a final truth. The major authors of human rights discourse seem to believe that all the most important human rights standards and norms have been set and that what remains of the project is elaboration and implementation. This attitude is at the heart of the push to prematurely cut off debate about the political and philosophical roots, nature, and relevance of the human rights corpus.

Debates about the universality of the corpus between Westerners[251] and Southerners[252] should not be viewed with alarm or as necessarily symptomatic of a lack of commitment to the human rights project by Southerners. Attempts to question the normative framework of human rights, their cultural relevance, and the need for a cross-cultural re-creation of norms will not be silenced or wished away by universalists who are unwilling to engage in the debate. As Deng and An-Na'im argued in a volume exploring these issues, the debate is just beginning:

> Whatever the reason for the controversy surrounding cross-cultural perspectives on human rights, the essays in this volume clearly demonstrate that the debate has just begun and that its parameters are still to be defined and its course is still to be charted. The central issue in this debate is whether looking at human rights from the various cultural perspectives that now coexist and interact in the world community promotes or undermines international standards.[253]

There is little doubt that certain states and governments will hide behind the veil of cultural sovereignty to perpetuate practices that are harmful to their populations. That cynicism, however, must not be confused with genuine attempts to bequeath cross-cultural legit-

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251. I use the term "Westerners" loosely here to denote advocates of universality, the most prominent of whom are drawn largely from the West and their soul mates in the South.

252. "Southerners" is a term I use here as a shorthand for "dissidents" within the human rights movement, that is, those who question the Eurocentric formulation of the corpus and call for a multicultural approach for its recreation. Many Southerners are non-Western and hail from Asia and Africa.

253. See Cross-Cultural Perspectives, supra note 9, at 9.

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imacy to a universal human rights corpus. Deng and An-Nai'm ask a series of biting questions that leave little doubt about the indispensability of cross-culturalism.[254] Richard Schwartz affirms this point of view: he sees the necessity of a cross-fertilization of cultures if a universal human rights corpus is to emerge. According to him:

> Every culture will have its distinctive ways of formulating and supporting human rights. Every society can learn from other societies more effective ways to implement human rights. While honoring the diversity of cultures, we can also build toward common principles that all can support. As agreement is reached on the substance, we may begin to trust international law to provide a salutary and acceptable safeguard to ensure that all people can count on a minimum standard of human rights.[255]

The failure of most universalists, particularly the conventional doctrinalists, to positively engage in this debate unnecessarily antagonizes cultural agnostics and may lend itself to legitimate charges of cultural imperialism. This is particularly the case if the human rights corpus is seen purely as a liberal project whose overriding goal, though not explicitly stated, is the imposition of a Western-style liberal democracy. The forceful rejection of dialogue also leads to the inevitable conclusion that there is a hierarchy of cultures, an assumption that is not only detrimental to the human rights project but is also inconsistent with the human rights corpus' commitment to equality, diversity, and difference.[256] Ultimately,

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254. An-Na'im and Deng ask:

> Is this [cross-cultural approach to creating a universal corpus] a fanciful ideal or an achievable objective? Are we being romantic and are we unnecessarily complicating the process of universalizing the cause of human rights, or are we presenting a cultural challenge for all members of the human family and their respective cultures that can help shape the lofty ideals of universal human rights? And could such worldwide involvement in itself lead to a realization of the universality of human dignity, which is the cornerstone of international human rights? *Or would it be more practical to assume that some cultures are just not blessed with these human ideals, and that the sooner they recognize this and try to adjust and live up to the challenge presented by the pioneering leadership of those more endowed with these lofty values, the better for their own good and for the good of humanity?*

Id. at 10-11 (emphasis added).

255. Richard D. Schwartz, Human Rights in an Evolving World Culture, in Cross-Cultural Perspectives, supra note 9, at 382.

256. Belief in cultural superiority violates more than the norms of the human rights movement. As this author has written elsewhere:

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the unrelenting universalist push seeks to destroy difference by creating the rationale for various forms of intervention and penetration of other cultures with the intent of transforming them into the liberal model. This view legitimizes intervention and leaves open only the mode of that intervention, that is, whether it is military, through sanction systems, bilateral or multilateral, as a cultural package bound in one or another form of exchange, or through trade and aid.

What should not be at stake when conversations about human rights are held is a singular obsession with the universalization of one or another cultural model. Rather, the imagination of norms and political models whose experimental purpose is the reduction—if not the elimination—of conditions that foster human indignity, violence, poverty, and powerlessness ought to be the overriding objective of actors in this discourse. For that to be possible, and to resonate in different corners of the earth, societies at their grassroots have to participate in the construction of principles and structures that enhance the human dignity of all, big and small, male and female, believer and unbeliever, this race and that community. But those norms and structures must be grown at home, and must utilize the cultural tools familiar to the people at the grassroots. Even if they turn out to resemble the ideas and institutions of political democracy, or to borrow from it, they will belong to the people. What the human rights movement must not do is to close all doors, turn away other cultures, and impose itself in its current form and structure on the world. A post-liberal society, however that will look, cannot be constructed by freezing liberalism in time.

> No one culture or religion is sovereign in relationship to any other culture or religion. From the perspective of the human rights movement, all cultures are equal. This view rejects the notion that there is a hierarchy of cultures or religions; that some cultures are superior to others even though technologically they may be more advanced. Belief in the contrary has led to military invasions to "civilize," colonize, and enslave, as was the case with Christianity in Africa.

Makau wa Mutua, Limitations on Religious Rights: Problematizing Religious Freedom in the African Context, in 2 Religious Human Rights in Global Perspective: Legal Perspectives 417 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

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